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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FRANK CLARKE, *et al.*,
Petitioners,

v.

CITY OF CINCINNATI, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents three distinct questions for review:

1. Whether, under an at-large voting system, a minority group's consistent ability to elect one—and occasionally two—candidates of its choice who are members of the minority group is sufficient as a matter of law to defeat a challenge to that system under Section 2 of the Voting Rights Act, when the minority group would have the opportunity to elect at least three minority group candidates if the council were elected from fairly drawn single-member districts.

2. Whether a court of appeals, having determined that the district court's Section 2 analysis of the legal significance of racially polarized voting was premised on a fundamental misunderstanding of the governing law, may nonetheless affirm the lower court's ultimate finding of no vote dilution on the basis of a single mathematical test and an "implicit" finding by the district court, rather than remand for reconsideration of the "totality of circumstances" under the proper legal standard.

3. Whether a court considering an Equal Protection Clause challenge to a facially neutral law enacted by popular referendum is barred from examining the electorate's motivations unless the only possible rationale for the measure was racially discriminatory.

PARTIES

The parties in the court below are as follows:

Plaintiffs-Appellants: Frank Clarke; W. Rickey Barksdale; Sen. William Bowen; Samuel Britton; Faye Clark; Clarence Clemons; Rev. Zedrick Coaston; Elaine Hughes; Nathaniel Jordan; Rep. William Mallory; Rev. James Milton; Shirley Rosser; Rev. Fred Shuttlesworth; Logan Wiley; Morris Williams; The Black Taxpayers Association.

Defendants-Appellees: City of Cincinnati; Dwight Tillery; Todd Portune; John Mirlisena; Roxanne Qualls; Bobbie Sterne; Peter Strauss; Neil Surber; Nicholas Vehr; Tyrone Yates; Hamilton County Board of Election; Don Driehaus; George C. Eyrich; Ralph B. Kohnen; Thomas A. Luken.

The plaintiffs-appellants in the court below are petitioners in this Court. The defendants-appellees in the court below are respondents in this Court.

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PETITION FOR A WRIT OF CERTIORARI

The petitioners are black citizens and registered voters in the City of Cincinnati ("City"), and the Black Taxpayers Association, an unincorporated association of black registered voters. They seek a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review that Court's decision rejecting their challenge to the City's at-large election system for the Cincinnati City Council, which petitioners contend was adopted in 1957 and has been maintained since then for a racially discriminatory purpose, and has had a racially discriminatory impact, in violation of Section 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973 ("§ 2"), and the Fourteenth and Fifteenth Amendments to the United States Constitution.

OPINIONS BELOW

The November 3, 1992 opinion of the Sixth Circuit is reported at 40 F.3d 807, and is reproduced in the Appendix ("App.") to this petition, App. 1a-19a. The December 16, 1994 order of the Sixth Circuit denying the petitioners' request for rehearing and suggestion for rehearing *en banc*, 1994 U.S. App. LEXIS 36107, appears at App. 68a. The July 8, 1993, opinion of the District Court for the Southern District of Ohio is unreported and appears at App. 20a-67a.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). This petition is being filed within 90 days of December 16, 1994, the date of the Sixth Circuit's judgment denying rehearing and rehearing *en banc*.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

This case primarily involves the application of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, and the Fourteenth Amendment (Equal Protection Clause) and Fifteenth Amendment to the United States Constitution, all reproduced at App. 69a.

STATEMENT OF THE CASE

A. Cincinnati and Its At-Large Election System

According to the 1990 U.S. Census, the population of Cincinnati is 364,040, of whom 60.5 percent are white and 37.9 percent are black. Of the voting age population, 64.3 percent are white and 33.5 percent are black. App. 32a.

Cincinnati has used an at-large system known as 9X to elect the Council from 1957 to the present. Under the 9X system, all nine councilmembers are elected at-large by plurality vote for a term of two years. Elections

are held in odd numbered years with all nine seats filled at once. Voters may cast up to nine votes, but no more than one of these votes may be cast for any particular candidate. The nine candidates with the most votes are elected to Council. There are no district or ward residency requirements for Council elections. App. 23a.[1]

B. The Adoption of the 9X System

From 1924 to 1955, Cincinnati's nine-member Council was elected under a single transferable vote system, known as proportional representation ("PR"). This system provides the opportunity for cohesive minority groups within the electorate, such as black voters, to elect candidates of their choice to office, even though elections are held at-large. PR had produced substantial black representation on Council by 1955. App. 25a, 28a.[2]

Most prominent of the black councilmembers was Ted Berry, who won election under the PR system in 1949, 1951, 1953 and 1955. Berry, who was strongly supported by black voters, was both an outspoken critic of racial segregation and a well-known advocate for the PR system. In 1953 and 1955, Berry ran first among candidates affiliated with the leading Cincinnati political party, the Charter Committee, a finish that ordinarily would have made him Mayor of Cincinnati. *See* App. 28a-29a.

On September 30, 1957, in a special referendum election, Cincinnati voters replaced PR with the current 9X

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[1] Since 1987, the candidate receiving the greatest number of votes has become the Mayor and served as Council's presiding officer. Prior to 1987, the Mayor was chosen by a majority vote of the Council. The City Manager, an official appointed by the Council, serves as the City's Chief Executive. App. 23a.

[2] Under PR in the 1950s, blacks (who then made up 14.9 percent of the City's voting age population) were able to elect either one or two black councilmembers. App. 32a; *see also* Additional Stipulations of Fact ¶ 7.

system. The campaign to repeal PR was spearheaded by the Republican Party which considered its prospects for control of Council improved under an at-large plurality vote system. App. 26a. As the district court found, the level of black representation on Council was discussed openly in the public debate surrounding the PR referendum.[3] As the City's only witness with personal knowledge of the events—councilmember Bobbie Sterne—conceded, race was "obviously" a factor in the 1957 repeal of PR. Trial Transcript ("Tr.") VII at 1207; PX 73. Other witnesses, both black and white, confirmed that the public was preoccupied with the possibility that Cincinnati could have a "nigger" mayor, and that rumors to this effect were heard over and over again in the white community. Tr. II at 282; PX 42 at 97-98; *see also* Tr. V at 892-93, Tr. VI at 1032-1033, PX 90, 112, 113.

Cincinnati in 1957 was ripe for the political exploitation of racial fears. Still a segregated city in the early 1950s, Cincinnati was experiencing a growth in racial hostility as black citizens moved to previously white neighborhoods. On September 24, 1957, just days before the PR referendum, federal troops were sent to Little Rock to enforce school desegregation. These events increased "racial consciousness" in Cincinnati. App. 30a.

Independent historical studies have concluded that racist motives played a key role in the outcome of the PR referendum.[4] As one leading scholar wrote in 1958, PR's defeat:

> [c]an be accounted for in large part by a renewed, expanded and effective use of an old ingredient of

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[3] App. 27a; *see also* Plaintiffs' Exhibit ("PX") 88 (PR places "dangerous emphasis on racial . . . bloc voting"), PX 89 (blacks overrepresented under PR), PX 89 (election of two blacks under PR threatens system); PX 85, 90, 100, 102, 103, 112, 113, 187.

[4] PX 41 at xi, PX 42 at 97, PX 79 at 218-219, PX 100, PX 112, PX 113, PX 164 at 84-85, PX 184 at 2, PX 187; Tr. II at 131-167.

> Cincinnati politics—racial hostility. In Cincinnati as in many other communities the Negro is breaking out of his ghetto. PR has helped him to break out politically. Symbolic of the Negro's effective use of PR to achieve political recognition has been the successful carreer of Ted Berry, Negro councilman and vice-mayor of Cincinnati. Throughout the recent repeal campaign racial bigots repeatedly raised two questions: Do you want Ted Berry to be mayor of Cincinnati? Do you want Ted Berry for your next door neighbor? Rumors had Berry buying a home in almost every white neighborhood in the city. In a minor fashion Cincinnati thus shares some of the tragedy of Little Rock, the tragedy lying not in the defeat of PR but in the extensive use of hate to achieve political power. R. Straetz, *PR Politics in Cincinnati*, xi (1958) (PX 41).

The repeal of PR led immediately to the electoral defeat of Ted Berry and other black Council candidates. Beginning with the 1957 Council election, no blacks were elected to Council for six years. App. 33a.

C. Racially Polarized Voting and Its Results Under 9X

From 1940 to 1990, Cincinnati's black voting age population roughly tripled. App. 32a. Despite this increase in the black population, the level of black representation on Council has not grown, averaging only one of nine members. App. 33a. The black community has consistently demonstrated a desire for greater representation on Council. In each of the six elections from 1981-1991, black voters chose as their first choice a black candidate. In five of those elections, black voters selected three black candidates among their top nine. (In 1987, two were selected.) App. 34a, 35a; PX 78; Defendant's Exhibit ("DX") AAAA.

Of the black candidates selected by black voters in these elections, the majority were defeated. App. 9a. The defeat of black candidates was the result of racial

bloc voting by white voters, who have never included more than one black among their top nine choices for Council. App. 35a. Only two blacks have been elected to Council since 1981 who were not among the top nine choices of white voters. Tr. II at 219; PX 78; DX AAAA. Moreover, in three of the six elections studied (1981, 1983 and 1985), the *first-choice* candidate of black voters was defeated by white bloc voting, despite receiving between 66% and 71% of the black vote. PX 78 (tables 1 and 3); DX AAAA at 1, 5, 7, 9-11.

In contrast, in all but one election *every candidate* who was ranked sixth or higher by white voters gained a seat on Council. (In 1991, a 5th-ranked candidate among white voters was defeated.) *Every candidate* who received 50 percent or more of the white vote from 1981 to 1991 was elected. White candidates preferred by white voters have even been elected with less than 20 percent of the black vote. App. 37a.[5]

Since 1981, the only three black candidates who were preferred by white voters—Kenneth Blackwell, Reggie Williams and Dwight Tillery—were incumbents, and two had previously been appointed to fill vacancies. Kenneth Blackwell was a conservative incumbent Republican, and was the only black candidate ranked among white voters' top nine choices in 1981, 1983, 1985 and 1987. Mr. Blackwell received, in relative terms, less support from black voters than he did from white voters. Reggie Williams was a former Bengals football star who won in 1989 running as an appointed incumbent. Dwight Tillery, an appointed incumbent, won in 1991 with the

[5] Racial bloc voting and white veto power have also been reflected in other City-wide contests. In 1988 and 1991, citizen-initiated referenda proposed changing the City's electoral system back to the PR system. On each occasion, approximately 75 percent of black voters favored changing to PR, while only 32.8 percent of white voters did; both proposals were defeated. In other words, efforts by the black community to repeal 9X were rejected by white voters. App. 31a, 45a.

benefit of unprecedented financial and other support from the Democratic Party. App. 35a-36a; Tr. V at 591-92, Tr. VI at 971-73, Tr. VII at 1178-83, Tr. VIII at 1317-19, 1390-91, Tr. IX at 1510-13.

D. Other Factors

Cincinnati's history of racial discrimination in housing, education and public accommodations is well documented. App. 42a-43a. Racial discrimination survives in Cincinnati today. For example, the Cincinnati Police Division ("CPD") operates under two consent decrees (entered into in August 1981 and September 1987, respectively) as a result of lawsuits over racial discrimination in the CPD. *See Vogel v. City of Cincinnati*, 959 F.2d 594, 599 (6th Cir.), *cert. denied*, 113 S.Ct. 86 (1992) (upholding consent decrees as based on sufficient evidence of past racial discrimination). App. 42a; PX 134, 136.[6]

Blacks continue to bear the effects of discrimination in Cincinnati and are disadvantaged, as compared to whites, in income, education, employment and housing. App. 37a. For example, 39.4% of blacks, compared to only 14.7% of whites, live at or below the poverty level —a higher percentage than in other large U.S. cities. Tr. IV at 468; PX 77 at 3, PX 190. These socioeconomic disadvantages hinder effective political participation by black citizens. App. 38a. This is especially true in Cincinnati, where city-wide campaigns are very costly (typically $100,000). App. 38a; Tr. IV at 597, 645-46; Tr. VI at 965-66; Tr. VII at 1212; Tr. VIII at 1382-83; Tr. X at 1770.

Although the ballot is nonpartisan, the three political parties active in Cincinnatti—the Republican and Demo-

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[6] Public education, fire department hiring, public contracting and housing also were the subjects of litigation during the 1980s documenting racial discrimination in Cincinnati. App. at 29a-32a.

cratic Parties and the Charter Committee—openly endorse and support candidates. Endorsements by any of the three parties is subject to approval by the top party leadership. App. 39a-40a. Appointment to a vacancy on Council is the easiest method by which candidates can gain the name recognition necessary to win election. The appointment process is even more tightly controlled by the top party leadership than is the endorsement process. App. 40a-41a. The top party leadership responsible for making not only endorsement and appointment decisions, but also decisions regarding financial and political support for candidates, has been almost entirely white.[7]

E. The District Court Opinion

The district court rejected plaintiffs' § 2 claim, ruling that plaintiffs had proved the first two preconditions for a § 2 claim set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986),[8] but had failed to establish the third: namely, that the white majority votes sufficiently as a bloc usually to defeat the candidates preferred by black voters. The district court determined that white voters consistently favored white candidates and that black vot-

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[7] Tr. IV at 591, 598, 638-43; Tr. V at 685; Tr. VI at 1082; Tr. IX at 1499-1501. Only one black—State Representative William Mallory, Sr., one of the plaintiffs—has ever held a top leadership position in any of Cincinnati's three parties. Tr. IX at 1499-1500. Furthermore, during the one year in which Mallory served in such a position—as Co-Chairman of the local Democratic Party in 1991—the responsibilities for making endorsement decisions were assigned to another party body. App. 40a.

[8] The court found that plaintiffs satisfied the first *Gingles* precondition by proving that the black population is sufficiently large and geographically compact to comprise a majority in at least three of nine single-member districts, and that they had satisfied the second precondition by proving that black voters are politically cohesive, in that a significant number of black voters generally vote for the same candidates. App. at 56a-57a.

ers preferred black candidates. App. 34a-35a. Nevertheless, although blacks had usually been unable to elect the black candidates for whom they voted, the court held that the race of the candidates elected is irrelevant under § 2, and that plaintiffs had not proven legally significant white block voting because white candidates who received black support were able to win election. App. 57a, 61a; *see also* App. 6a. The district court also cited the fact that some black candidates had won election to Council, App. 60a, but did not address, as *Gingles* requires, whether "special circumstances" accounted for this success. *Gingles*, 478 U.S. at 57, 75-76. The court also found against plaintiffs with regard to other factors which, under *Gingles*, would be supportive of, but are not essential to, a § 2 case.

The district court also ruled against plaintiffs' claim of intentional racial discrimination in the 1957 PR referendum and the subsequent maintenance of the 9X system. The court found that the level of racial representation produced by the PR system "was discussed openly in the public debate" on the referendum, that then-Mayor Charles Taft wrote in 1957 that the "nastiest kind of anti-negro whispering campaign by the hard-core Republican precinct people" was responsible for the defeat of PR, that recent moves to desegregate housing and employment had "created racial tensions" in the City prior to the referendum,[9] and that Ted Berry and all other black candidates were defeated for six years after the repeal of PR, despite the fact that blacks constituted 20 percent of the voting age population. App. 27a-28a, 30a, 32a-33a. The district court also noted that opposition to PR was not limited to racial factors, citing criticisms that PR was confusing and subject to long ballot counts. App.

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[9] Despite its own finding that the advent of desegregation "created racial tensions" in Cincinnati, App. 30a, the district court also made a contradictory finding that racial tensions were high in some parts of the country in 1957 but not in Cincinnati. App. 51a.

27a. The court held, however, that the actual motives *of the electorate* in adopting the referendum were irrelevant, and that plaintiffs had not proved racial intent *on the part of City officials* in sponsoring the 1957 referendum. App. 52a, 53a.

F. The Sixth Circuit Opinion

With respect to plaintiffs' § 2 claim, the Sixth Circuit agreed with petitioners' primary argument on appeal: that the district court had applied the wrong legal standard by ruling that the race of the candidate is irrelevant in evaluating the existence of legally significant white bloc voting. App. 6a-9a. The court of appeals held, however, that, despite the district court's erroneous legal analysis, one summary statistic in the record was sufficient to permit affirmance. The court held that white bloc voting could not be considered legally significant because 47% of the black candidates preferred by black voters had been elected. App. 9a. The court of appeals did not address the impact upon its analysis of other important facts bearing on the significance of this summary statistic.[10]

The Sixth Circuit found it legally irrelevant that this "success rate" had generally produced only one black representative out of nine on Council, or occasionally two, even though black voters had generally voted to elect three black candidates to Council. The court acknowledged that this holding conflicted with that of the Fourth Circuit in *Collins v. City of Norfolk*, 883 F.2d 1232 (4th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990), but ruled that consideration of the level of black representation

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[10] For example, the court did not consider the crucial factor of candidate *rank*: the *first*-choice candidates of black voters are regularly defeated, even though white voters, in all but one election, were able to elect *every* candidate whom they ranked *sixth* or higher.

achieved on Council would violate the "proportional representation" proviso of § 2. App. 10a-11a.[11]

Although the district court did not make a determination, as required by *Gingles*, as to whether "special circumstances" accounted for the success of some of the black candidates, the court of appeals did not reverse on this ground, but attempted its own analysis of the issue. Addressing only one of the several factors which plaintiffs had alleged as special circumstances—the factor of incumbency—the court of appeals agreed with the district court's "implicit" finding that incumbency did not account for the success of black candidates, because incumbency in Cincinnati played "only its usual role in American politics". App. 12a.

The Sixth Circuit then turned to plaintiffs' Equal Protection challenge to the 1957 PR referendum, holding that this challenge was barred by its 1986 ruling in *Arthur v. City of Toledo, Ohio*, 782 F.2d 565 (6th Cir. 1986). In the appellate court's view, "absent a referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially motivated, a district court cannot inquire into the electorate's motivation in an equal protection clause context." App. 15a-16a, quoting *Arthur*, 782 F.2d at 574. Based on this holding, the court of appeals ruled that the district court was correct in refusing to examine whether the adoption of the 9X system was racially motivated. App. 16a.

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[11] Judge Boggs issued a concurring opinion on the § 2 claim, arguing that the § 2 claim could also be rejected because the degree of racially polarized voting shown by the statistics was not as high as in certain voting rights cases from southern jurisdictions. App. 17a-19a. He did not include, however, a comparison with the relevant figures in *Gingles*. *Id.*

REASONS FOR GRANTING THE PETITION

The court of appeals has erroneously decided three questions of considerable public importance, in each instance in a manner that conflicts with decisions of other circuits.

I. THE COURT OF APPEALS' VOTE DILUTION ANALYSIS EXPRESSLY CONFLICTS WITH THE DECISION OF ANOTHER CIRCUIT, AND IS CONTRARY TO THIS COURT'S RULINGS IN *THORNBURG v. GINGLES* AND *JOHNSON v. DeGRANDY*.

In restricting its inquiry to the "success rate" of black candidates, the court of appeals declined to consider the fact that although Cincinnati's black voters had consistently voted to elect three black councilmembers, they were never successful in doing so, and were able to elect only one black representative in most of the elections studied.[12] On this issue, the court acknowledged that it was taking a position contrary to that adopted by the Fourth Circuit:

> The facts set forth in *Collins v. City of Norfolk, Va.*, 883 F.2d 1232 (4th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990), though, are similar to those present here. In *Collins*, 54 percent of blacks' preferred black candidates had been elected in the ten city council elections studied. Despite this success, black voters had never been able to elect more than one of their preferred candidates (of any race) during any single election. Over a vehement dissent, a majority of the panel found a § 2 violation because the record indicated that "the white majority normally voted sufficiently as a bloc" to frustrate black voters' efforts "to elect a *second* black councilman." App.

[12] Although two black representatives were elected in 1983 and again in 1991, the district court found that in the 35 years since the repeal of PR, only eight blacks have been elected to Council, App. at 33a-34a, yielding an average of only 1.05 out of 9, App. at 33a, 37a.

> 10a (citing *Collins*, 883 F.2d at 1240 and adding emphasis).[13]

The court based its refusal to follow *Collins* on its belief that consideration of the degree to which white bloc voting might have denied black voters the opportunity to elect two, or even three, black representatives would violate the proportional representation proviso of § 2:

> The reasoning of the *Collins* majority appears flawed, however, because it has no stopping point short of guaranteed proportional representation for racial minorities. . . . Thus, the *Collins* approach effectively would delete from § 2 the language that was so critical to its approval by Congress: "*Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b) (emphasis in original). We therefore decline to follow *Collins*.

App. 10a-11a.

The court of appeals erred in declining to follow *Collins*. Just as the Fourth Circuit recognized that a 54 percent success rate in electing one of seven (14%) councilmembers could not overcome other persuasive evidence that Norfolk's 35% black population did not enjoy equality of electoral opportunity, so the court of appeals in this case should have understood that a 47 percent success rate in electing, on average, one of nine councilmembers was no guarantee of such equality for the 33.5% of Cincinnati's voters who are black. Any contrary rule would, as recognized by the Fourth Circuit in *Collins*, "place[] a stamp of approval on token representation." *Collins*,

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[13] The court of appeals ruling on this point is in conflict not only with *Collins*, but also with *Barnett v. Daley*, in which the Seventh Circuit held that black voters could challenge Chicago's city council redistricting plan on grounds of vote dilution even though the plan created a proportional number of black majority aldermanic wards. 32 F.3d 1196, 1201-03 (7th Cir. 1994).

883 F.2d at 1240. The fact that a one-third black electorate can consistently elect a single black councilmember, and occasionally two, does not prove as a matter of law that the minority enjoys the same opportunity as the majority group "to elect representatives of its choice." 42 U.S.C. § 1973(b).

The use of fairly drawn single-member districts as a benchmark for measuring vote dilution under an at-large system is at the heart of *Thornburg v. Gingles*: "[t]he single-member district is generally the appropriate standard against which to measure minority group potential to elect." 478 U.S. 30 at 50 n.17 (1986). It follows that evidence of disproportionality—in the sense that a minority group challenging an at-large election system has shown that it is unable to elect as many representatives as it could under fairly drawn single-member districts—is highly relevant to the § 2 inquiry. *Cf. Gingles*, 478 U.S. at 90-91 (O'Connor, J., concurring in the judgment).

The use of a single-member district plan as the benchmark for measuring undiluted voting strength is far different from mandating proportional representation. As the Court explained in *Gingles*, use of such a benchmark "would only protect racial minority votes from diminution proximately caused by the districting plan; it would not assure racial minorities proportional representation." 478 U.S. at 51 n.17 (quotation marks and emphasis omitted).

This principle was reaffirmed by the Court only last term, in *Johnson v. DeGrandy*, 114 S. Ct. 2647 (1994), which addressed the meaning of vote dilution in the context of a § 2 challenge to single-member legislative districts. Confronted with the question whether § 2 can require that a minority group be afforded a level of representation greater than that which would achieve proportionality, the Court endorsed the *Collins* approach. Emphasizing that equal political opportunity must be the focus of the inquiry, the Court rejected the reasoning of the court of appeals in this case that vote dilution can never be established under § 2 where the impact of white

bloc voting is limited to preventing the minority from achieving a level of representation consistent with its proportionate strength in the voting population:

> "Proportionality" as the term is used here links the number of majority-minority voting districts to minority members' share of the relevant population. The concept is distinct from the subject of the proportional representation clause of § 2 . . . . This proviso speaks to the success of minority candidates, as distinct from the political or electoral power of minority voters. . . . [T]he ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race. 114 S. Ct. at 2658, n.11 (citations omitted).

Because the Sixth Circuit declined to consider evidence bearing upon the opportunity of blacks to elect a second or third minority representative, its analysis of the "totality of circumstances" (42 U.S.C. § 1973(b)) bearing on equality of electoral opportunity was incomplete. As Justice O'Connor emphasized in *DeGrandy*, "Lack of proportionality is probative evidence of vote dilution." 114 S.Ct. at 2664 (concurring in the judgment). Under the court's approach to measuring a minority group's opportunity to elect, there could be no finding of vote dilution so long as first-seat successes outnumber second/third-seat losses —even if other evidence shows conclusively that there is no opportunity to achieve proportionality. Where there are nine councilmembers and discriminatory voting patterns account for the inability of a one-third minority to elect, on average, more than one candidate, then no "success rate" in electing that single candidate should be determinative. If the political reality is that black voters have been relegated to a token seat, and they have no real opportunity for increased representation, it would not comport with the purpose of § 2 to mask this reality by concluding simplistically that minority voters have succeeded (consistently, for the first seat) more often than they have failed (usually for the second seat, and always for the third).

The Sixth Circuit's "success rate" methodology warrants this Court's attention for the added reason that it conflicts with *Gingles*' teaching that racially polarized voting becomes legally significant when the white bloc vote is sufficient "usually" to defeat the minority's preferred candidate. *Gingles*, 478 U.S. at 50-51. Applying this test, the court held that when the minority's preferred black candidates are successful 47 percent of the time, there is no reason to find that they have "usually" been defeated. App. 9a. But when white bloc voting has been sufficient to defeat a *majority* (53 percent) of such candidates, logic and common usage would appear to provide more than ample reason to find the test met.[14]

On a practical level, the construction adopted by the court of appeals opens a whole new area of uncertainty for district courts faced with the application of the third *Gingles* precondition in future cases. If the *Gingles* standard does not require a demonstration that the minority's preferred candidates are defeated more often than not, but requires that such losses account for some undefined super-majority of the elections studied, the value of the third precondition as useful guidance will be vastly diminished.

The Sixth Circuit's treatment of the vote dilution issue warrants the Court's review not only because it reflects a misunderstanding of the *Gingles* standard and conflicts with decisions of the Fourth and Seventh Circuits, but also because it involves a question which will arise in virtually every vote dilution challenge to an at-large electoral system under which the minority plaintiffs have experi-

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[14] The court of appeals appears to have assumed that "usually" means something other than "most of the time." In rejecting a "more often than not" interpretation, the court of appeals makes the paradoxical finding that white bloc voting in Cincinnati was "usually" *not* sufficient to defeat black candidates, yet at the same time *was* sufficient to prevent them from "usually" prevailing; *i.e.*, black candidates in the elections studied "usually" ***neither won nor lost.***

enced *any* measurable success. The Court should seize this opportunity to make clear that no single "success rate"—particularly one below 50 percent—in electing minority candidates to a body on which the minority group has achieved less than proportionality can, without more, preclude a finding of vote dilution.

II. THE COURT OF APPEALS' REFUSAL TO CONSIDER INCUMBENCY A "SPECIAL CIRCUMSTANCE" IN ASSESSING THE SUCCESS OF MINORITY CANDIDATES CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND WITH THIS COURT'S RULING IN *THORNBURG v. GINGLES*.

The district court's failure to consider whether some or all of the limited success of black candidates was due to such special circumstances as incumbency was clear error under *Gingles*, which requires an examination of "special circumstances" that may account for some minority electoral success despite a significant pattern of white bloc voting. 478 U.S. at 51. Two other circuits have held that a district court's failure to analyze properly the special circumstances bearing on minority electoral success constitutes legal error. See *Collins v. City of Norfolk*, 883 F.2d 1232, 1242-43 (4th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990); *Jenkins v. Red Clay Consol. School Dist. Bd. of Educ.*, 4 F.3d 1103, 1119 n.9 (3d Cir. 1993), *cert. denied*, 114 S.Ct. 2779 (1994). Instead of confirming a second instance of legal error by the district court, however, the Sixth Circuit attempted to save the district court's judgment by making its own *de novo* findings on the issue. The court's analysis of the impact of special circumstances was flawed in three respects.

First, the court of appeals held that "[t]he Supreme Court has not yet had occasion to describe the conditions under which incumbency may be a "special circumstance," and that [t]o qualify as a "special" circumstance . . . incumbency must play an unusually important role in the

election at issue . . . ." App. 11a. With all respect, there is not a shred of support for this approach in *Gingles*. To the contrary, this Court has indicated that incumbency is a "special circumstance" which, when it exists, should be considered in evaluating the electoral success of minority candidates. The district court in *Gingles* made no finding that incumbency played an "unusually important" role in North Carolina before weighing it as a special circumstance, *see Gingles v. Edmisten*, 590 F. Supp. 345, 369-70 (E.D.N.C. 1984), *aff'd in rel. part and vac'd in part on other grounds sub. nom Thornburg v. Gingles*, 478 U.S. 30 (1986), yet this Court expressly noted that the lower court "took account of the benefits incumbency . . . conferred on some of the successful black candidates," *Gingles*, 478 U.S. at 60, and concluded that the district court's approach "satisfactorily addresses each facet of the proper legal standard." *Id.* at 61.

To reason, as the Sixth Circuit did, that the fact that 3 of 8 *successful* black candidates were first elected as challengers "indicates that . . . incumbency has played not a 'special' role, but only its usual role in American politics," App. 12a, completely overlooks the fate of the *unsuccessful* black candidates. When these failed candidacies are taken into account, it is evident that only *1 of 17* black candidates was able during the decade studied (1981-1991) to achieve election without the benefit of incumbency. App. 34a. Just as one might have expected if incumbency were an important factor in a black candidate's electoral success—and contrary to the court of appeals' suggestion—black challengers *were* "almost uniformly unsuccessful." [15] *See* App. 12a.

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[15] Although the panel noted that three black candidates have been elected without first being appointed to vacancies, only one of those victories occurred within the last ten years; the others occurred in 1963 and 1977. Indeed, in the six elections studied by the expert witnesses, only "three African American candidates were preferred by white voters—J. Kenneth Blackwell, Reggie Williams, and Dwight Tillery. Each of these candidates was an incumbent . . . . Mr. Blackwell was a conservative incumbent Republican, who

Second, the court discussed only *one* of the special circumstances which plaintiffs had identified—the issue of incumbency, App. 35a-36a—ignoring other equally important factors such as the unique celebrity status of one successful black candidate.

Third, even if incumbency *is* an advantage to both black and white candidates, the fact remains that the appointment process undermines the political equality of black voters. As the district court acknowledged, the appointment process is controlled by the party leadership, which has been almost exclusively white. App. 39a-41a. Thus, even those few black candidates who have had electoral success in Cincinnati must pass through a "filter" administered by white party leaders. *Id.* In sum, the district court committed clear legal error in failing to consider special circumstances in determining the legal significance of white bloc voting, and the court of appeals erred in affirming in the face of this legal error.

III. BY REVERSING THE DISTRICT COURT'S LEGAL RULING THAT THE RACE OF THE CANDIDATE IS IRRELEVANT TO THE *GINGLES* FACTOR III ANALYSIS, YET NONETHELESS AFFIRMING THE LOWER COURT'S ULTIMATE FINDING OF NO VOTE DILUTION, THE COURT OF APPEALS HAS ERRONEOUSLY EMBRACED AN APPELLATE PROCEDURE WHICH EFFECTIVELY DENIES THE MINORITY GROUP THE "SEARCHING PRACTICAL EVALUATION" OF THE "TOTALITY OF CIRCUMSTANCES" WHICH THE STATUTE REQUIRES.

By substituting its own truncated *Gingles* factor III analysis for the analysis which the district court failed to

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in relative terms received less support from the African American voters than he did from white voters . . . . Mr. Williams was a former Cincinnati Bengals football star, and was an appointed incumbent when elected . . . . Mr. Tillery was also an incumbent by appointment. . . ." App. at 35a-36a. As the lower court summed up, "[s]uccessful African American candidates have been appointed incumbents . . .". App. at 39a.

perform (because it misunderstood the law), the court of appeals effectively denied petitioners the "searching practical evaluation of the 'past and present reality,' " *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986), upon which resolution of the central question of equality of electoral opportunity should be based.[16] As this Court observed in *DeGrandy*: [t]he ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts." 114 S.Ct. 2647, 2657 (1994).

Having made no determination that the record in this case "permits only one resolution of the factual issue," a proper application of Rule 52 of the Federal Rules of Civil Procedure should have led the court of appeals to remand for a new finding on the third *Gingles* precondition. *See Pullman-Standard, Div. of Pullman, Inc. v. Swint*, 456 U.S. 273, 292 (1982). The court's decision to affirm was in direct conflict not only with *Pullman*, but with the decisions of other circuits, which have held that a district court's use of an incorrect legal standard in determining the existence of legally significant white bloc voting warrants a remand or outright reversal. *See Jenkins v. Red Clay*, 4 F.3d at 1135-36; *Collins v. City of Norfolk*, 883 F.2d 1232, 1242-44 (4th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990); and *Gomez v. City of*

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[16] Because the court of appeals held that Cincinnati has not experienced legally significant white bloc voting, it did not address the errors which plaintiffs identified in the district court's assessment of the so-called Senate Report factors. *See* Brief for Plaintiffs-Appellants at 34-40. Instead, the panel merely held that even if white bloc voting was legally significant, it would affirm the district court's judgment based on the totality of circumstances. This approach is inconsistent with the mandate of Section 2. Indeed, other circuits have expressly disapproved the type of "even-if" analysis employed here by the Sixth Circuit, because it is clearly inconsistent with the requirement of searching review set forth in *Gingles*. *See Jenkins v. Red Clay*, 4 F.3d at 1135.

Watsonville, 863 F.2d 1407, 1411, 1419 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989). This Court reached an identical conclusion in *DeGrandy*: "Because the ultimate finding of vote dilution . . . was based on a misreading of the governing law, we hold it to be clearly erroneous." 114 S.Ct. at 2662 (citing *Gingles*, 478 U.S. at 79).

IV. BY HOLDING THAT A FACIALLY NEUTRAL REFERENDUM IS EXEMPT FROM JUDICIAL SCRUTINY UNLESS THE ONLY POSSIBLE RATIONALE FOR THE MEASURE WAS RACIALLY MOTIVATED, THE COURT OF APPEALS HAS ERRONEOUSLY PLACED A SIGNIFICANT AND GROWING BODY OF STATE LAW BEYOND THE REACH OF THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE.

In upholding the district court's refusal to examine the motivations of Cincinnati's electorate in repealing Proportional Representation, the court of appeals held that: "[A]bsent a referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially motivated, a district court cannot inquire into the electorate's motivations in an equal protection clause context." App. 15a-16a (*quoting Arthur v. City of Toledo, Ohio*, 782 F.2d 565, 574 (6th Cir. 1986)).

Under *Washington v. Davis*, 426 U.S. 229, 242-45 (1976), minority plaintiffs must prove intent in order to obtain redress against racially discriminatory referenda—no matter how stark the impact.[17] But under the Sixth Circuit's rule, district courts are in most instances pre-

[17] Following the repeal of PR by the 1957 referendum, no blacks were elected to the Council for six years, even though blacks comprised roughly 20 percent of the voting age population by 1960. App. 33a. By comparison, under PR in 1950, blacks were able to win either one or two Council seats, even though they made up only 14.9 percent of the then-existing population. App. 29a, 32a; Additional Stipulations of Fact ¶ 7.

cluded from examining the intent of the decision-making body: the referendum electorate.

A. The Decision Below Creates a Direct Conflict Between the Fifth and Sixth Circuits.

The Fifth Circuit, in *Kirksey v. City of Jackson*, 669 F.2d 316 (5th Cir. 1982) (denying a petition for rehearing), expressly held that courts may scrutinize the motives of a referendum electorate, by examining either direct or circumstantial evidence of intent.[18] Although it affirmed the district court's finding of a lack of discriminatory purpose, based on the district court's detailed analysis of the evidence regarding electoral intent,[19] and held that *individual* voters may not be required to explain the motivations behind their votes, the Fifth Circuit in *Kirksey* stressed the propriety of judicial inquiry into the motivation of the electorate as a whole:

> We specifically note that our decision is not to be misunderstood as holding or suggesting that, in a proper case, the motivation of the electorate may not be examined by the introduction of either direct or circumstantial evidence. . . . The referendum process may not be used to legitimate an unconstitutional act. *Kirksey v. City of Jackson*, 669 F.2d 316, 317 (5th Cir. 1982).[20]

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[18] The circumstantial evidence of racial motivation which the district court in this case noted, but did not consider relevant, is discussed, *supra*, Parts I.B and I.E.

[19] *See Kirksey v. City of Jackson*, 506 F. Supp. 491, 500-17 (S.D. Miss. 1981) (analyzing testimony of public officials, newspaper articles, academic studies, and other evidence to address the five-factor test for determining the presence of discriminatory intent that was established by *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266-67 (1977)), *aff'd*, 663 F.2d 659 (5th Cir. 1981), *reh'g denied, clarified*, 669 F.2d 316 (5th Cir. 1982).

[20] The Sixth Circuit's ruling that the possibility of a non-racial motivation frees referenda from equal protection scrutiny is also in conflict with *Kendrick v. Walder*, in which the Seventh Circuit

B. The Court Should Take This Opportunity to Confirm That Measures Adopted by the Electorate Are Subject to the Same Equal Protection Standard as Those Adopted by the Legislature, and That Judicial Inquiry Into Electoral Motivation Is Not Only Permitted, But Required.

This Court has unequivocally held that measures adopted by the electorate should be subjected to the same constitutional scrutiny as those adopted by legislatures, both in the context of Equal Protection Clause and other constitutional claims.[21] This Court has not had an occasion, however, to instruct the lower courts regarding the nature of their inquiry into the electorate's motivation.

As this Court has stated: "We hold that the fact that a challenged . . . [measure] was approved by the electorate is without federal constitutional significance." [22]

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reversed a district court's dismissal and remanded for trial the plaintiffs' claim that the implementation of a city commission form of government (which was chosen by a referendum) violated the Equal Protection Clause. All three circuit judges agreed that the plaintiffs' equal protection claim should not be dismissed, in spite of the fact that one of the three judges noted the fact that several nondiscriminatory motivations (*i.e.*, eliminating provincialism and corruption, promoting efficiency) are generally associated with the selection of a commission form of government. 527 F.2d 44, 51-54 (7th Cir. 1975).

[21] Outside of the context of equal protection claims, this Court has stated, "It is irrelevant that the voters rather than a legislative body enacted [a challenged law] because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 295 (1981) (First Amendment); *see also City of Eastlake v. Forest City Enterprise*, 426 U.S. 668, 676 (1976) (Due Process).

[22] *See also City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985) ("It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause . . .". (*citing Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 736-37 (1964) and *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. at 737. The *Lucas* Court never addressed the motivation of the electorate, however, because it found that the challenged amendment (which had been adopted by the electorate) violated the one-person, one-vote requirement of *Reynolds v. Sims*, 373 U.S. 533 (1964). *Lucas*, 377 U.S. at 734-39. In *Hunter v. Erickson*, this Court repeated that "[t]he sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed." 393 U.S. 385, 392 (1969). However, the *Hunter* Court did not find it necessary to analyze the motivation of the electorate in adopting the challenged city charter amendment, because it found that the amendment involved an "explicitly racial classification treating racial housing matters differently from other racial and housing matters." *Id.* at 389. Similarly, in *Washington v. Seattle School Dist. No. 1*, this Court found it unnecessary to address the issue of the motivation of the electorate because it found that the referendum measure "singled out" a political process used to address racially conscious legislation "for peculiar and disadvantageous treatment."[23] 458 U.S. 457, 485-86 (1982).

This Court has decided two equal protection claims that required a finding regarding electoral motivation.

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[23] The *Washington* Court did tacitly approve of the district court's finding of a discriminatory motivation on the part of the electorate: "there is little doubt that the initiative was effectively drawn for racial purposes . . . [a fact of which the Washington electorate] . . . surely was aware." *Washington v. Seattle*, 458 U.S. at 471. In spite of the district court's view that it would be safe to "assume that a great many voters were motivated solely by" a nondiscriminatory motive and in spite of its refusal to consider evidence concerning the subjective intent of the voters, the district court found that the electorate was motivated by a discriminatory purpose based on the five-factor test established by *Arlington Heights. Seattle School Dist. No. 1 v. State*, 473 F. Supp. 996, 1013-16 (W.D. Wash., 1979), *aff'd on other grounds, Seattle v. State of Washington*, 633 F.2d 1338 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982).

In neither of these cases, however, did the Court specify how, if at all, the determination of discriminatory motivation is or is not altered by the fact that a challenged measure has been adopted by the electorate, as opposed to a legislature. In *Reitman v. Mulkey*, 387 U.S. 369 (1967), this Court affirmed the decision of the California Supreme Court to strike down a state constitutional amendment which barred state and local regulation of housing discrimination. In finding the amendment unconstitutional, this Court deferred to the state court's finding of discriminatory motivation, tacitly approving that court's use of circumstantial evidence to find discriminatory motivation on the part of the electorate.[24] *Id.* at 374.

In *James v. Valtierra*, 402 U.S. 137 (1971), this Court upheld an amendment (which had been approved by popular vote) to California's state constitution that required voter approval for all low-income housing projects. The Court distinguished the amendment from the Akron referendum declared unconstitutional in *Hunter v. Erickson* on the grounds that the former did not involve a racial classification. *Id.* at 141. The Court also found a lack of racial motivation, but did not discuss the test used to find such motivation. *See id.* at 141 ("And the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority.").

In the legislative context, by way of contrast, this Court has not only emphasized that facially neutral legislation is subject to equal protection scrutiny even when there are some nondiscriminatory motives for its adop-

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[24] The California Supreme Court had found the electorate's approval of the amendment was motivated by a discriminatory purpose, based on types of evidence similar to that proferred by the plaintiff-appellants in the instant case. *See Mulkey v. Reitman*, 413 P.2d 825, 828-30 (Cal. 1966) (examining the historical background of the initiative, the sequence of events leading to its enactment and the effects of its enactment) *aff'd*, 387 U.S. 369 (1967).

tion,[25] but has also specified that courts should evaluate the existence of a discriminatory purpose based on the "aggregate" of evidence. *Rogers v. Lodge*, 458 U.S. 613, 622, *reh'g denied*, 459 U.S. 899 (1982). Thus:

> Determining whether invidious discriminatory purpose was a motivating factor of a challenged decision demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available, including factors such as an evaluation of the impact of the decision, the historical background of the challenged legislation, and the specific sequence of events leading up to the passage of the challenged legislation. *Arlington Heights*, 429 U.S. at 266-267.

Had it been allowed to consider these factors to evaluate the intent of the electorate (as was done by the district courts in *Kirksey v. Jackson*, *see*, *supra*, n.20 and accompanying text, in *Washington v. Seattle*, *see*, *supra*, n.24, and in *Reitman v. Mulkey*, *see*, *supra*, n.25), the district court in the instant case would have had to give weight to its own factual findings regarding the heightened "race consciousness" among Cincinnati's electorate, the use of racist arguments in the referendum campaign, and the immediate effect of the referendum's passage, *see*, *supra*, Parts I.B and I.E,[26] rather than base its conclusion on the

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[25] *See Arlington Heights*, 429 U.S. at 265 (plaintiffs need not "prove that the challenged action rest[s] solely on racially discriminatory purposes"); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose' . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group").

[26] Although it expressly based its affirmance of the district court's finding of nondiscriminatory purpose on *Arthur*'s prohibition of any inquiry into the intent of the electorate, the court of appeals added a puzzling addendum: "Although we rely on *Arthur* to decide this issue, this evidence was strong enough to support a holding that the district court did not clearly err when it found there were in fact neutral explanations for the replacement of PR

absence of discriminatory purpose on the part of city officials. App. 51a-53a.

Just as the Court has directed the lower courts to examine both direct and circumstantial evidence to determine whether a discriminatory motive is partly responsible for legislative action, so the Court should use this case to confirm explicitly that a similar analysis is necessary when the motivation of the electorate is at issue.

C. Given the Increasing Use of Referenda in State and Local Governance, the Question Presented Is of Sufficient Importance That Review by This Court Is Clearly Warranted.

Referenda [27] are playing an increasing role in addressing controversial issues in American politics. In the 1994 elections, in addition to referendum measures considered by voters in many states, voters considered 78 citizens' initiatives at the state level, the largest number in the last fifty years. D'Jamila Salem, *National Perspective: '94 Elections—Bypassing the Politicians*, L.A. Times, Oct. 19, 1994, at A5. For every statewide refer-

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with 9X." App. 16a. This purported alternative justification for affirmance of the district court's finding of nondiscriminatory purpose is defective, of course, because even if the district court did not err in finding that there were neutral explanations for the referendum's passage, the existence of such nonracial purposes cannot overcome a significant racial motivation—if it exists. The court of appeals' alternative rationale for affirmance—premised on the simple existence of nondiscriminatory factors—is clearly at odds with the approach taken by the Fifth and Seventh Circuits in analyzing electoral intent, *see, supra*, Part IV.A and the approach taken by this Court in analyzing legislative intent. *See, supra*, Part IV.B and accompanying text.

[27] For purposes of this petition, the term referenda is being used to refer to both citizens' initiatives (where a measure is placed on the ballot by securing a specified number of voter signatures) and referenda (where a measure is submitted to the voters by the legislature or executive).

endum or initiative, there are approximately fifty such measures at the local level. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale L.J. 1503, 1510 (May, 1990).[28]

Many of these referenda address controversial issues with constitutional implications, including equal protection concerns. Legislatures frequently refer difficult issues to the electorate without voting on them. *See, e.g.*, Craig Baggot, *State Referendums: Cop-Out or Democracy?*, The Hartford Courant (Apr. 18, 1992), B1 (noting that Connecticut legislators had used referenda to avoid voting on two of the most controversial issues they faced in recent years). Recent measures adopted via statewide initiatives include Colorado's 1992 approval of a measure prohibiting legal claims of discrimination based on sexual orientation and California's 1994 approval of Proposition 187, which prohibits illegal immigrants from receiving all public benefits (including education) other than emergency medical care. *See* Thomas Galvin, *Propositions: Local Initiatives Send Signals on National Trends*, Cong. Q. 2904 (Oct. 23, 1993); Karen Foerstel, *The Initiatives: Voters Favor Term Limits, Reject Tax Restrictions*, Cong. Q. 3251 (Nov. 12, 1994).

This Court should grant review to determine whether this growing body of state and local law will be effectively immunized from scrutiny under the Constitution's guarantee of equal protection.

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[28] A 1970 study estimated the annual national volume of local measures to range between 10,000 to 15,000. *See id.* at 1510, n.25 (*citing* Howard D. Hamilton, *Direct Legislation: Some Implications of Open Housing Referenda*, 64 Am. Pol. Sci. Rev. 124, 125 (1970)).

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: March 16, 1995

APPENDICES

BEST AVAILABLE COPY

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 93-3864

FRANK CLARKE; W. RICKEY BARKSDALE; SEN. WILLIAM BOWEN; SAMUEL BRITTON; FAYE CLARKE; CLARENCE CLEMONS; REV. ZEDRICK COASTON; ELAINE HUGHES; NATHANIEL JORDAN; REP. WILLIAM MALLORY; REV. JAMES MILTON; SHIRLEY ROSSER; REV. FRED SHUTTLESWORTH; LOGAN WILEY; MORRIS WILLIAMS; THE BLACK TAXPAYERS ASSOCIATION,

Plaintiffs-Appellants,

v.

CITY OF CINCINNATI; DWIGHT TILLERY; TODD PORTUNE; JOHN MIRLISENA; ROXANNE QUALLS; BOBBIE STERNE; PETER STRAUSS; NELL SURBER; NICHOLAS VEHR; TYRONE YATES; HAMILTON COUNTY BOARD OF ELECTION; DON DRIEHAUS; GEORGE C. EYRICH; RALPH B. KOHNEN; THOMAS A. LUKEN,

Defendants-Appellees,

JAMES CISSELL, *et al.*,

Defendants.

On Appeal from the United States District Court
for the Southern District of Ohio

Decided and Filed November 3, 1994

Before: GUY and BOGGS, Circuit Judges; and CLELAND, District Judge.*

GUY, J., delivered the opinion of the court, in which CLELAND, D. J., joined. BOGGS, J. (pp. 17-19), delivered a separate concurring opinion.

RALPH B. GUY, JR., Circuit Judge. Plaintiffs appeal the judgment entered in favor of defendants with regard to plaintiffs' challenge, under § 2 of the Voting Rights Act and the Equal Protection Clause, to the system currently used to elect the members of the city council of Cincinnati, Ohio. Plaintiffs argue that, contrary to the district court's findings, "white bloc voting" has been present under the challenged electoral system and that this system was enacted with racially discriminatory intent. We disagree with plaintiffs, and affirm.

I.

Between 1924 and 1957, Cincinnati utilized a system known as "proportional representation" (PR) to elect the nine members of its city council. Councilmembers were elected at large under this system. Although each voter listed his candidate preferences in rank order, the voter's ballot was counted only towards the highest-ranked candidate whom it could help elect. The mechanics of this system were quite complex, but they essentially ensured that each voter's ballot was credited to the voter's highest-ranked candidate who had not yet beet assured of victory or defeat based on the other ballots already counted toward the candidate's total.

PR eroded the Republican Party's dominance of Cincinnati government, and the party launched a sustained effort to repeal it. This effort led to voter referenda in 1936, 1939, 1947, 1954, and 1957 on the issue of whether PR should be repealed. In the debates surrounding each of these referenda, the opponents of PR argued

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* The Honorable Robert H. Cleland, United States District Court for the Eastern District of Michigan, sitting by designation.

that PR was difficult to understand and administer, caused an inordinate number of ballots to be declared invalid, yielded seemingly inequitable results, and balkanized the electorate into religious, racial, ethnic, geographic, and labor interest groups. Despite these arguments, PR narrowly avoided repeal in the referenda before 1957. In the 1957 referendum, however, the voters chose to replace PR with the current system of electing councilmembers, which is known as 9X.

Under 9X, the nine councilmembers are still elected at large, but each voter may vote for up to nine candidates. A voter cannot, however, allocate more than one vote to a particular candidate. The nine candidates who receive the most votes are elected for a two-year term of office. There are no district or ward residency requirements for city council candidates.

Black candidates, at least initially, fared less well under 9X than they had under PR. Blacks made up about 15 percent of the electorate in Cincinnati during the mid-1950s, and were by that time routinely elected to the city council in numbers roughly equal to their proportion of the electorate. After 9X was instituted, however, no blacks were elected to the city council until 1963. Since 1963, the number of black councilmembers has ranged from zero to two, with one being the average. In the 1991 election, which was the most recent election before this lawsuit was filed, two black candidates were elected. One of these candidates, Dwight Tillery, was designated Mayor of Cincinnati because he received more votes that any other candidate, white or black. Blacks nevertheless have not been elected to the city council in numbers equal to their proportion of the electorate, because in 1990 blacks constituted 33.5 percent of the voting-age population in Cincinnati.

Plaintiffs filed this lawsuit in March 1992, alleging that 9X violates their rights under the Voting Rights Act and the Fourteenth and Fifteenth Amendments. During a ten-

day bench trial, the parties presented statistical evidence that focused on the results of the six city council elections between and including the years 1981-1991. For each of these elections, the statistics isolated the nine candidates who received the most support from black voters ("blacks' preferred candidates").[1] This evidence revealed that 40 of 54, or 74 percent, of blacks' preferred candidates were elected; that 32 of 37, or 86 percent, of blacks' preferred candidates who were white were elected; and that 8 of 17, or 47 percent, of blacks' preferred candidates who were black ("blacks' preferred black candidates") were elected. After considering this and other evidence, the district court entered judgment in favor of defendants. This appeal followed.

II.

In considering plaintiffs' arguments on appeal, we review *de novo* the court's interpretation of the relevant law, but review the court's factual findings for clear error only. *Thornburgh v. Gingles*, 478 U.S. 30, 79 (1986). Whether

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[1] Plaintiffs suggest that white candidates cannot be included among "blacks' preferred candidates," but we disagree. Although some courts have cautioned that a candidate who receives the support of a majority of black voters in a multimember election might not be a "preferred" candidate of blacks, *see Collins v. City of Norfolk, Va.*, 883 F.2d 1232, 1238 (4th Cir. 1989) (noting that other candidates may be " 'preferred by a significantly higher percentage of the minority community' " when each voter's ballot " 'may contain votes for more than one candidate' "), *cert. denied*, 498 U.S. 938 (1990), courts generally have understood blacks' preferred candidates simply to be those candidates who receive the greatest support from black voters. *See, e.g., Jenkins v. Red Clay Consol. School Dist. Bd. of Educ.*, 4 F.3d 1103, 1127 (3rd Cir. 1993) ("Since approximately 100% of the black voters of Red Clay supported Mitchell, he was clearly their candidate of choice."), *cert. denied*, 114 S. Ct. 2779 (1994); *Smith v. Clinton*, 687 F. Supp. 1310, 1315-16 (E.D. Ark. 1988) (three-judge panel). *See also Sanchez v. Bond*, 875 F.2d 1488, 1495 (10th Cir. 1989) ("Nothing in the [Voting Rights Act] indicates that the chosen representative of a minority group must be a minority."), *cert. denied*, 498 U.S. 937 (1990).

an electoral system has diluted the voting power of a minority group is a factual question, *id.*, as is whether such a system was adopted with racially discriminatory intent. *Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982).

III.

Section 2 of the Voting Rights Act provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect represenatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.

In *Gingles*, the Supreme Court interpreted the above-quoted language to establish three "necessary preconditions" to a successful § 2 challenge by a minority group to an electoral district:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate.

Id. at 50-51 (citations omitted). If these three preconditions are met, a variety of other factors are then examined to determine whether, given the "totality of the circumstances," the multimember electoral district has in fact "diluted" the minority's electoral strength and thus denied members of the minority group a fair opportunity to elect representatives of their choice. *Gingles*, 478 U.S. at 48-49 & n. 15.

The parties do not dispute that the first and second preconditions have been met here, but the district court held that the third precondition—the existence of white bloc voting as defined by the *Gingles* Court—had not been proven by plaintiffs. The court noted the 74 percent success rate of blacks' preferred candidates in the 1981-91 elections, and thus concluded that blacks' preferred candidates were usually elected, not usually defeated. The court expressly refused, however, to consider the lower (47 percent) success rate of blacks' preferred black candidates.

The district court's refusal to consider a candidate's race in its white bloc voting analysis was based on the only portion of Justice Brennan's *Gingles* opinion that was not supported by (and indeed was rejected by) a majority of the Court. In that portion of his *Gingles* opinion, Justice Brennan asserted that "the race of the candidate *per se* is irrelevant" to a § 2 inquiry because, in his view, "[u]nder § 2, it is the *status* of the candidate as the *chosen*

representative of a particular racial group, not the race of the candidate, that is important." 478 U.S. at 67-68. Justice White, who supplied the fifth vote for the remainder of Justice Brennan's opinion, noted that this reasoning could unduly broaden the scope of § 2:

> Suppose an eight-member multimember district that is 60% white and 40% black, the blacks being geographically located so that two safe black single-member districts could be drawn. Suppose further that there are six white and two black Democrats running against six white and two black Republicans. Under Justice Brennan's test, there would be polarized voting and a likely § 2 violation if all the Republicans, including the two blacks, are elected, and 80% of the blacks in the predominantly black areas vote Democratic. I take it that there would also be a violation in a single-member district that is 60% black, but enough of the blacks vote with the whites to elect a black candidate who is not the choice of the majority of black voters. This is interest-group politics rather than a rule hedging against racial discrimination.

Id. at 83 (White, J., concurring). Justice O'Connor, writing for herself and three other Justices (who did not include Justice White), agreed with Justice White's conclusion on this point. *Id.* at 101 (O'Connor, J., concurring in the judgment).

Plaintiffs argue that the district court's colorblind approach to the white bloc voting issue, and the court's resultant focus on the overall success rate of blacks' preferred candidates, allows the ability of black voters to elect *white* candidates of their choice to mask, or "submerge," the inability of black voters to elect *black* candidates of their choice. Plaintiffs therefore urge us to reject the reasoning of Justice Brennan and examine whether white bloc voting denied black Cincinnatians the opportunity to elect black candidates to the city council.

We agree with plaintiffs and Justices White and O'Connor that a candidate's race can be relevant to a § 2 inquiry. The approach suggested by Justice Brennan is based on an interpretation of § 2 that is at once over- and underinclusive. That interpretation is overinclusive because, as Justice White makes clear, it would cause courts to find a § 2 violation in many cases where the defeat of blacks' preferred candidates had nothing to do with the inability of blacks to participate fully in the political process. Justice Brennan's approach thus transforms § 2 into a categorical guarantee of a certain level of success for blacks' preferred candidates. By its plain language, however, the Act guarantees to racial minorities an equal *opportunity* to elect candidates of their choice, not a floor on the success rates of those candidates. When, in the competition inherent in the democratic process, a racial group's preferred candidates are defeated despite the ability of its members to participate fully in that process, the Voting Rights Act should not provide that group with a remedy which is unavailable to other supporters of defeated candidates.

Justice Brennan's interpretation of § 2 is underinclusive because it fails to recognize a § 2 violation in many instances where blacks truly do not enjoy an equal opportunity to "elect [their] candidate of choice on an equal basis with other voters." *Voinovich v. Quilter*, 113 S. Ct. 1149, 1155 (1993). When white bloc voting is "targeted" against black candidates, black voters are denied an opportunity enjoyed by white voters, namely, the opportunity to elect a candidate of their own race. If black voters nevertheless are able to elect many or most of their preferred candidates who are white, a court that refuses to consider candidate race will be unable to conclude that "the white majority votes sufficiently as a block to enable it . . . *usually* to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51 (emphasis added). Such a court thus will find no § 2 violation. But the Act's guarantee of equal opportunity is not met when, in the words of Judge

Richard Arnold, "[c]andidates favored by blacks can win, but only if the candidates are white." *Smith v. Clinton*, 687 F. Supp. 1310, 1318 (E.D. Ark. 1988) (three-judge panel). *See also Jenkins v. Red Clay Consol. School Dist. Bd. of Educ.*, 4 F.3d 1103, 1125-26 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 2779 (1994); *Citizens for a Better Gretna v. City of Gretna, La.*, 834 F.2d 496, 502 (5th Cir. 1987) ("That blacks also support white candidates acceptable to the majority does not negate instances in which white votes defeat a black preference [for a black candidate]."), *cert. denied*, 492 U.S. 905 (1989); *but see Carrolton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1559 (11th Cir. 1987) (following Brennan approach), *cert. denied sub nom. Duncan v. City of Carrollton, Ga., Branch of NAACP*, 485 U.S. 936 (1988).

We therefore accept plaintiffs' invitation to consider whether the district court overlooked white bloc voting targeted against blacks' preferred black candidates. As suggested earlier, the existence of racially identifiable voting patterns itself is not sufficient to demonstrate the existence of white bloc voting; rather, to find that white block voting is targeted against a group of candidates, "a [white] majority must *usually* be able to defeat" them. *Gingles*, 478 U.S. at 49 (emphasis in original). Here, the parties do not dispute that there have been racially identifiable voting patterns under 9X. In the 1981-91 city council elections, however, 47 percent of blacks' preferred black candidates were elected. This success rate gives us no reason to find that blacks' preferred black candidates have "usually" been defeated. We therefore conclude that white bloc voting has not been targeted against blacks' preferred black candidates in the city council elections under 9X.[2]

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[2] Given this conclusion, we need not consider whether a showing that the minority-preferred candidates' lack of success is "somehow tied to race," *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993) (en banc), *cert. denied*, 114

The cases in which the opposite conclusion was reached are either factually distinguishable or unpersuasive. *Smith* and *Gretna* fall into the former category, as no black candidates had ever been elected under the districting schemes challenged in those cases. *Smith*, 687 F. Supp. at 1312; *Gretna*, 834 F.2d at 504. Similarly, in *Jenkins*, blacks' preferred black candidates had been defeated in six of the seven elections at issue. 4 F.3d at 1113, 1130.

The facts set forth in *Collins v. City of Norfolk, Va.*, 883 F.2d 1232 (4th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990), though, are similar to those present here. In *Collins*, 54 percent of blacks' preferred black candidates had been elected in the ten city council elections studied. Despite this success, black voters had never been able to elect more than one of their preferred candidates (of any race) during any single election. Over a vehement dissent, a majority of the panel found a § 2 violation because the record indicated that "the white majority normally voted sufficiently as a bloc" to frustrate black voters' efforts "to elect a *second* black councilman." *Id.* at 1240 (emphasis added).

The reasoning of the *Collins* majority appears flawed, however, because it has no stopping point short of guaranteed proportional representation for racial minorities. The *Collins* approach ignores the extent to which a racial group's preferred candidates are successful, and considers only the elections in which those candidates lose. Since this approach normally would yield a finding of white bloc voting, it likewise would lead courts to find a § 2 violation in virtually every case brought under that section. The handful of exceptional cases would be those in which defendants demonstrate that plaintiffs have enjoyed "per-

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S. Ct. 878 (1994), is a prerequisite to a finding of "*legally significant* white bloc voting." *Gingles*, 478 U.S. at 56 (emphasis supplied). *See generally Clements*, 999 F.2d at 850-63 (concluding that such a showing is necessary).

sistent proportional representation," *Gingles*, 478 U.S. at 77, which, the Supreme Court has instructed, is presumptively inconsistent with the existence of a § 2 violation. *Id.; see also id.* at 102 (O'Connor, J., concurring in the judgment). Thus, the *Collins* approach effectively would delete from § 2 the language that was so critical to its approval by Congress: "*Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b) (emphasis in original). We therefore decline to follow *Collins*.

Plaintiffs next argue that "special circumstances" have concealed the existence of white bloc voting in the Cincinnati city council elections. In *Gingles*, the Court stated that "the success of a minority candidate in a particular election does not necessarily prove that the district did not experience [racially] polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, *may* explain minority electoral success in a polarized contest." 478 U.S. at 57 (emphasis added) (footnote omitted). Plaintiffs assert that the special circumstance of incumbency explains away the success enjoyed by black candidates for city council because five of the eight blacks elected to the city council under 9X were first appointed to that body.

The Supreme Court has not yet had occasion to describe the conditions under which incumbency may be a "special circumstance." But unlike other "special circumstances," incumbency plays a significant role in the vast majority of American elections. To qualify as a "special" circumstance, then, incumbency must play an unusually important role in the election at issue; a contrary rule would confuse the ordinary with the special, and thus "make practically every American election a 'special circumstance.'" *Collins*, 883 F.2d at 1250 (Chapman, J., dissenting).

If, as plaintiffs suggest, black candidates have needed the benefits of incumbency to overcome an otherwise insurmountable degree of white voter opposition to their candidacies, one would expect black challengers to have been almost uniformly unsuccessful. But under 9X, over one-third—or 3 of 8—of the successful black candidates for city council were first elected as challengers. (App. at 161.) This fact indicates that, in elections involving black candidates. incumbency has played not a "special" role, but only its usual role in American politics. We therefore agree with the district court's implicit finding that special circumstances do not account for the success enjoyed by black candidates for city council.[3]

Since plaintiffs failed to prove the "necessary precondition" of white bloc voting, we need not consider the various other factors that can be probative of a § 2 violation.[4] Even if we were to do so, however, the result we reach would be no different. After considering all of the evidence presented by the parties at trial, the district

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[3] We note that a contrary holding would punish the city for its commendable efforts to increase black representation on the city council by means of the appointment process.

[4] Those factors include: (1) "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process"; (2) whether the challenged election district is "unusually large"; (3) "if there is a candidate slating process, whether members of the minority group have been denied access to that process"; (4) "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process"; (5) "whether political campaigns have been characterized by overt or subtle racial appeals"; (6) "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group"; and (7) "whether the policy underlying the state or political subdivision's use of [the electoral system] is tenuous." *Gingles*, 478 U.S. at 36-37.

court expressly found that discrimination by the City "has not touched the right of African American citizens to register, to vote, or otherwise to participate in the electoral process"; that the city council nomination processes of the major parties are "open to and participated in by African Americans"; and that "[t]he City's approach to dealing with issues of concern to the African American community displays a consistent pattern of responsiveness to those concerns." (App. at 482, 474, and 480.) The record amply supports these findings. Moreover, given the difficulties experienced in the administration of PR, we cannot say that the policy underlying 9X is "tenuous." It is true that the 9X district is large, that black Cincinnatians generally are poorer and less-educated than white Cincinnatians, and that, in recent elections, candidates campaigning in the mostly white west side of the City have said that they "know what the West Side needs" or support "West Side values." (App. at 3130, 2194). On the whole, however, we cannot conclude that the district court —which is "composed of [a] local judge[] who [is] well acquainted with the political realities" of the City, *Gingles*, 478 U.S. at 80—clearly erred in concluding that the use of 9X has not caused black voters in Cincinnati "to have less opportunity than white voters to elect representatives of their choice." *Id.*[5]

IV.

Plaintiffs also argue that 9X was enacted with a racially discriminatory purpose, in violation of the Equal Protection Clause.[6] At trial, plaintiffs presented evidence that

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[5] We also note that the Senate Judiciary Committee report for § 2, upon which the *Gingles* Court heavily relied, cites with approval a 1978 Justice Department study which concluded, after a detailed investigation, that 9X did not dilute the voting power of black Cincinnatians. S. Rep. No. 205, 97th Cong., 2nd Sess. 35 (1982), *reprinted in* 1982 U.S.C.C.A.N. 213.

[6] Although plaintiffs' complaint also alleged that 9X violated the Fifteenth Amendment, plaintiffs have made no Fifteenth Amendment argument before this court.

racial tensions had been on the rise prior to the 1957 referendum; that then-Mayor Charles Taft (a PR supporter) blamed the defeat of PR on "the nastiest kind of anti-negro whispering campaign by the hard-core Republican precinct people" (app. at 458-459); that the public debate concerning the referendum addressed the extent to which "religious, ethnic, racial, and political minorities" were represented on the city council under the PR system (app. at 457); that the only incumbent defeated in the 1957 city council elections (which were the first held under 9X) was Theodore Berry, a leading black politician; that no black was elected to the city council until six years after 9X was adopted; and that a number of scholars concluded that race was the decisive factor in the repeal of PR.

The district court rejected, however, plaintiffs' equal protection argument. Although the court stated that "the motive of voters in casting their particular votes [in the 1957 referendum] is irrelevant to the inquiry before this Court[]" (app. at 490), the court found that "[i]t is unlikely that race was a motivating factor in any campaign to repeal PR[]" (app. at 458), and that it was "highly unlikely that the citizens of Cincinnati defeated PR because they were threatened by the fact that Theodoer Berry could have been Mayor." (App. at 460.) The court further noted that the officials of "the City did not invidiously inject race as an issue in the 1957 campaign to repeal PR." (App. at 459.) The district court thus concluded that "[t]he repeal of PR can be attributed to objective factors such as low voter turnout at a special election; the deficiencies of PR; and partisan political interests." (App. at 459.)

Plaintiffs now contend that the district court erred in refusing to examine in isolation the motives of the electorate in repealing PR. This error of law, plaintiffs assert, caused the district court to reach an erroneous conclusion on the ultimate question of discriminatory purpose.

It is well settled that electoral systems "violate the Fourteenth Amendment if 'conceived or operated as purposeful devices to further racial discrimination' by minimizing, cancelling out or diluting the voting strength of racial elements of the voting population." *Rogers v. Lodge*, 458 U.S. 613, 617 (1982) (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971)). That such a system is adopted by means of the referendum process does not "immunize" it from constitutional scrutiny, since "[t]he sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed." *Hunter v. Erickson*, 393 U.S. 385, 392 (1969).

In *Arthur v. City of Toledo, Ohio*, 782 F.2d 565 (6th Cir. 1986), however, we closely examined the Supreme Court cases involving equal protection challenges to referendum election results, and concluded that "neither the Supreme Court nor this Court has ever inquired into the motivation of voters in an equal protection clause challenge to a referendum election involving a facially neutral referendum unless racial discrimination was the only possible motivation behind the referendum results." *Id.* at 573 (footnote omitted). Writing for a unanimous panel, Judge Kennedy articulated "[s]everal important policy considerations [that] limit a court's examination of the factors motivating the electorate in a referendum election." *Id.* These considerations included the difficulty of "ascertaining what motivated the electorate" and our belief that "the 'bigoted comments of a few citizens, even those with power, should not invalidate action which in fact has a legitimate basis.' " *Id.* at 574-75. We further noted that, just as the policies embodied in Fed. R. Evid. 606(b) prohibit "federal courts from inquiring into the validity of a jury verdict[,]" so too "the policies underlying the 'secret ballot' prevent courts from inquiring into the votes of the electorate." *Id.* at 574. We therefore "h[e]ld that absent a referendum that facially discriminates racially, or one

where although facially neutral, the only possible rationale is racially motivated, a district court cannot inquire into the electorate's motivations in an equal protection clause context." *Id.*[7]

In light of these principles, the district court was correct to reject plaintiffs' equal protection argument. 9X is not racially discriminatory on its face, and the repeal of PR in favor of 9X was supported by numerous rationales that had nothing to do with race. Defendants presented significant evidence that PR was an administrative botch that often left voters feeling confused and powerless. Although we rely on *Arthur* to decide this issue, this evidence was strong enough to support a holding that the district court did not clearly err when it found there were in fact neutral explanations for the replacement of PR with 9X.

AFFIRMED.

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[7] Plaintiffs suggest that this rule and the lengthy discussion that preceded it were dicta because the *Arthur* court went on to observe that racially neutral rationales supported the electorate's decision in the referendum examined in that case. *See* 782 F.2d at 574. But that observation was necessary to show that the referendum in *Arthur* could be supported by a rationale that was not racially motivated. Our observation thus was made in the course of applying the rule quoted in the text, not in the course of supplanting it. Moreover, even if that rule somehow were dicta, we reaffirm it today.

BOGGS, Circuit Judge, concurring. In addition to the convincing logic expressed in Judge Guy's opinion, I write separately to express an additional way of looking at the data in the record.

One excellent measure of polarized voting or white bloc voting is the difference between the percentage of whites who vote for a given candidate and the percentage of blacks who vote for the same candidate. In the classically polarized races in most of the southern voting-rights cases, this figure has tended to be 80 percent or more for almost all candidates (e.g., a black candidate receiving 90 percent of the black vote and 10 percent of the white vote; a white candidate receiving 10 percent of the black vote and 90 percent of the white vote). In the major recent Voting Rights Act cases that have found that the second *Gingles* factor is present, similarly large numbers are shown by the data. *See, e.g.*, the following cases and their accompanying figures computed as given above:

Jenkins v. Red Clay Sch. Dist., 4 F.3d 1103, 1120 (3rd Cir. 1993), *cert. denied*, 114 S. Ct. 2779 (1994)

$$(100 - 1 = 99);$$

Hines v. Ahoskie, 998 F.2d 1266, 1269 (4th Cir. 1993)

$$(93 - 7 = 86);$$

League of United Latin Am. Citizens v. Clements, 999 F.2d 831 (1993) (en banc), *cert. denied*, 114 S. Ct. 878 (1994)

$$(98 - 17 = 81);$$

Smith v. Brunswick County, Virginia, Bd. of Supervisors, 984 F.2d 1393, 1397 (4th Cir. 1993)

$$(80 - 2 = 78);$$

Westwego Citizens for Better Gov't v. City of Westwego, 946 F.2d 1109, 1113 (5th Cir. 1991)

$$(89 - 16 = 73);$$

Perkins v. City of West Helena, 675 F.2d 201, 213 (8th Cir.), *aff'd*, 459 U.S. 801 (1982)
(90 — 15 = 75; 90 — 24 = 66);

Solomon v. Liberty County, Florida, 899 F.2d 1012, 1019 (11th Cir. 1990), *cert. denied*, 498 U.S. 1023 (1991)

(six elections, with percentage differences ranging from 97 (100 — 3) to 24 (65 — 41), with an average percentage difference of 55);

Marylanders for Fair Representation, Inc. v. Schaefer, 849 F. Supp. 1022, 1059 n.62 (D. Md. 1994)
(100 — 0 = 100; 100 — 12 = 88).

The comparable figures in our record, J.A. at 1319-34, show much, much lower levels of polarization. For example, the ratio for the nine candidates most favored by blacks in 1985 ranges from Spencer's figure of 52 (70 — 18) to Cissell's figure of 2 (43 — 41), with an average of less than 20. J.A. at 1319. A similar analysis of the nine candidates most favored by whites shows a similar range from 2 to 53, with an average of 21. The 1989 analysis, J.A. at 1327, shows a range from Mallory at 41 (60 — 19) to Qualls at 1 (40 — 39), with an average of 22 for the nine candidates most favored by blacks. Similarly, the range for the nine candidates most favored by whites is from Chabot at 45 (63 — 18) to Qualls, with an average of 24. The analysis for the other elections given on those pages is similar. Thus, the average for any group of nine candidates never exceeds 30, and the largest single discrepancy, even among those most touted by plaintiff's witness Engstrom, J.A. at 1315, is a difference of about 53, in the cases of Spencer in 1985 and Yates in 1987. These figures are starkly different from those in the cases that I cited earlier.

Such numbers do not demonstrate the type of "bloc voting" required to prove a violation of the Voting Rights Act. Bloc voting is not the same as simply differential

voting or identifiable voting. Even though a political scientist could no doubt *identify* mostly black and mostly white precincts in every city in America, there is not a Section 2 violation every time there is any perceptible difference in racial voting patterns. There must be the kind of stark and persisent polarization that prevents a minority from having an opportunity to win, not a guarantee of winning. Judge Weber did not err in his assessment that Cincinnati does not show such a pattern.[1]

[1] I also wish to amplify the point made by the court's opinion in the second paragraph on page 10. Looking only at elections lost by minority-preferred candidates *necessarily* leads to a finding of racial bloc voting everywhere. A losing candidates who wins a majority of one portion of the electorate necessarily must receive only a minority of the remainder of the electorate. Thus, the approach properly rejected by the court *invariably* would yield a finding of white bloc voting.

APPENDIX B

[Filed Jul. 8, 1993]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

C-1-92-278

FRANK CLARKE, *et al.*,
Plaintiffs,

v.

CITY OF CINCINNATI, *et al.*,
Defendants.

ORDER

I. *INTRODUCTION*

1. Since 1957, the City of Cincinnati, Ohio has been governed by a City Council consisting of nine members elected by the voters of the City at-large. The question before the Court is whether this at-large system of municipal elections violates the voting rights of plaintiffs in contravention of federal statutory or constitutional law.

2. The plaintiffs in this action, Frank Clarke, W. Rickey Barksdale, Sen. William Bowen, Samuel Britton, Faye Clarke, Clarence Clemons, Rev. Zedrick Coaston, Elaine Hughes, Nathaniel Jordan, Rep. William Mallory, Rev. James Milton, Shirley Rosser, Rev. Fred Shuttlesworth, Logan Wiley and Morris Williams, are African American citizens and registered voters in the City of Cincinnati and the Black Taxpayers Association, an unincorporated association of African American registered

voters most of whom are citizens of the City of Cincinnati, Ohio.

3. Plaintiffs William Mallory and William Bowen are prominent elected members of the Ohio General Assembly. Mr. Mallory also has served as the co-chair of the Hamilton County Democratic Party.

4. The defendants are the City of Cincinnati; City Councilmembers Dwight Tillery, Todd Portune, John Mirlisena, Roxanne Qualls, Bobbie Sterne, Peter Strauss, Nell Surber, Nicholas Vehr and Tyrone Yates (collectively "the City"); the Hamilton County Board of Elections; and the individual members of the Board of Elections (collectively "the Board"). Defendant City of Cincinnati is a municipal corporation organized and existing under the constitution and laws of the State of Ohio and exercising the power of home rule pursuant to the Charter of the City of Cincinnati.

5. Plaintiffs challenge the current method of electing the City Council. Plaintiffs contend that the current at-large system of election unlawfully dilutes the voting strength of African American citizens and denies them an equal opportunity to participate in the political process and to elect candidates of their choice, in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. They also contend that the adoption and maintenance of the at-large system violates their rights under the Fourteenth and Fifteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. They seek injunctive and declaratory relief against the present system of electing City Councilmembers.

6. The method of electing councilmembers profoundly affects the character of politics in a municipality. The on-going debate over electoral reform in Cincinnati is a fundamental debate. The debate is neither trivial, tenuous nor invidious. Rather, it is both profound and fundamental to Cincinnati home rule and implicates the respec-

tive influences of the Democratic and Republican Parties and the Charter Committee on councilmanic politics in Cincinnati.

7. Proponents of the at-large electoral system insist that because a councilmember must look to the city as a whole for votes, he/she is obliged to take a city-wide view of issues and concerns. At-large elections eliminate the petty politics of favor-giving.

The Supreme Court has recognized:

> ". . . a system of at-large city elections in place of elections of city officials by the voters of small geographic wards was universally heralded not many years ago as a praiseworthy and progressive reform of corrupt municipal government."

City of Mobile v. Bolden, 446 U.S. 55, 70 (1980).

8. The proponents of a district system insist that because a councilmember must look to his/her district for votes, he/she is obliged to represent the interests of the people of that district and will be responsive to their needs. Also, districts facilitate proportional representation of African Americans on Council.

9. The City Council exercises the legislative power of the City of Cincinnati. It is presided over by a Mayor who is a member of City Council. The Mayor's other duties are ceremonial. While Councilmembers have no administrative or executive duties, some Councilmembers look upon the position of Councilmember as a full-time job. All members of Council spend many hours in the course of their legislative duties. All have an open door policy and are sensitive to all citizens complaints. All, when approached by an individual, attempt to address the complaints and concerns of that individual to the best of their ability and resources. As a result of their efforts and service, Councilmembers receive private and public acknowledgement for their service. This enhances their pub-

lic image and name recognition, improves their public relations and their opportunity to be retained in office. This advantage of incumbency improves their chances to be elected which is an advantage non-incumbents do not enjoy.

II. *FINDINGS OF FACT*

1. Under the City of Cincinnati's 9X system, City Council is elected at-large by plurality vote for a term of two years. Elections are held in odd numbered years with all nine seats up for election each time. The nine candidates receiving the most votes are elected to Council. Service on Council is limited to eight consecutive years. After a hiatus of four years following the eight consecutive years of service, a former Councilmember may again be a candidate for election. Each registered voter in the City may cast as many as nine votes, no more than one for any candidate. A voter is not required to cast any minimum number of votes. There are no district or ward residency requirements for election to City Council. The ballot for election is non-partisan and endorsement by any group is not a prerequisite to nomination. The Court will refer to this system as the 9X system.

2. In the general election held in November, 1991, the Charter Amendment was adopted restricting the terms of Councilmembers to eight consecutive years.

3. Since 1987, the candidate receiving the greatest number of votes has become the Mayor and served as City Council's presiding officer. Prior to 1987, the Mayor was chosen by a majority vote of the City Council without regard to the number of votes he/she received in the general election. The City Manager, an official appointed by the City Council, serves as the City's Chief Executive.

4. City Council elections in Cincinnati are nominally non-partisan. Political party affiliations do not appear with the candidate's name on the ballot and the candidate is not nominated by primary election.

5. The Charter Committee is an organization of approximately 5,000 active members deeply interested in Cincinnati politics. It is not a political party and is not subject to the statutory requirements regarding political parties. It was formed in 1924 with the purpose of "cleaning-up" the City, getting the Charter passed by the electorate, and instituting and safeguarding those reforms. The basic tenets of the Charter Committee are: the city manger/Council form of government, a small Council elected at-large by proportional representation as the voting method, a nonpartisan ballot, candidates nominated by petition instead of by political parties, and civil service as opposed to patronage for filling city jobs. The candidates it supports must agree to support these objectives. Its members are mostly regsitered with one or the other of the major political parties for activities outside the City of Cincinnati. It has a 44 member governing Board and a 15 member leadership committee which includes the Charterite Councilmembers. Since 1925, it has had remarkable success in electing members to City Council until 1985 when the Democratic Party broke up the coalition between it and the Charter Committee. The Committee represents approximately 2% of the voting age population of Cincinnati.

6. The Republican and Democratic Parties and the Charter Committee openly endorse and support candidates. Endorsement by one of the three is necessary as a practical matter in order to succeed in gaining election to City Council. Every member of City Council is closely aligned with a political party or the Charter Committee.

7. Since the 1960's, the Democrats and the Charterites have derived their electoral strength from roughly the same constituency. When they have maintained a coalition and cross-endorsed their candidates, they usually have controlled Council.

8. It is expected that a candidate, regardless of race, will fail in his/her first election bid for City Council. It

is not unusual for a candidate to fail in a second attempt before succeeding to be elected to City Council.

9. For over forty years prior to 1924, Cincinnati was under the almost uninterrupted control of a single political party, the Republican party. The City Council, at that time, consisted of 26 ward representatives and six members elected at-large. In 1924, of these 32 councilmembers, 31 were Republican and one was a Democrat.

10. In 1924, the voters of Cincinnati fundamentally reformed their government by adopting a city manager form of government with a council of nine members elected at-large on a nonpartisan ballot by proportional representation.

11. From 1924 to 1957, the City Council was elected under this system. PR is a single transferable vote system which allocates votes according to a formula based on voter preference.

12. Each voter was required to rank candidates in order of preference, one through nine. These votes would then be allocated among all the candidates running for Council according to the formula. The nine candidates ranked one through nine under the formula were elected to City Council. A major criticism of PR was that the formula, rather than the vote of the people, determined the outcome of the election.

13. The Charter Amendment replacing PR was placed on the ballot through ballot initiative by order of the Ohio Courts.

14. On February 7, 1956 and on February 28, 1956, a total of 777 part petitions containing the signatures in excess of ten percent (10%) of the electors of the City were filed with the Council. The petitions presented the Council a proposed amendment to the Charter, pursuant to Article XVIII, Section 9 of the Constitution of Ohio, to change the method of electing Council. The propon-

ents sought to have the Charter amendment submitted to the voters at the primary election on May 8, 1956.

15. On March 7, 1956, by a vote of five to three, the City rejected the petitions finding that there were an insufficient number of signatures. Proponents of the Charter amendment filed suit in the Court of Common Pleas, Hamilton County, Ohio seeking to compel the City to present the Charter amendment to the electorate. On April 9, 1956, the Court issued a preemptory writ of mandamus:

> . . . ordering Council forthwith to pass an ordinance providing for the submission of the proposed amendment to the Charter to a vote of the electors of the City at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission at a special election to be called and held not less than sixty nor more than one hundred and twenty days after passage of such ordinance.

State ex rel. Blackwell v. Bachrach, 59 Ohio Op. 198, 135 N.E.2d 92, 100 (C.P. Hamilton Cty. 1956). The Court of Appeals for Hamilton County reversed the decision of the Court of Common Pleas. On May 1, 1957, the Supreme Court of Ohio reversed the Court of Appeals and affirmed the Writ.

16. The Charter Amendment was adopted by the voters in a special election held on September 30, 1957.

17. The opposition to PR was spearheaded by the Republican Party and Republican Councilmembers who considered their prospect for control of City Council improved under an at-large plurality vote system. Having dominated City Council before PR was instituted for many years prior to 1924, the Republicans sought to regain that dominance through the adoption of an electoral system which would wound the Charter Committee.

The campaign to repeal PR was motivated by the desire to enhance the influence of the Republican Party. Today, 9X enhances the influence of the Democratic Party. The 9X system does enhance the influence of the predominant organized political party and minimizes, here in Cincinnati, the influence of the Charter Committee.

18. Alternative methods of electing City Council had been placed before the voters of Cincinnati several times prior to 1957. These earlier efforts to replace PR were not successful. The 1957 vote repealing PR was 65,593 for repeal and 54,004 against. In a 1947 referendum, PR had been retained by a 7,602 vote margin. In a 1954 referendum, the margin for retaining PR dwindled to just 607 votes. In 1957, there were 11,589 less votes cast than in the 1954 election.

19. The debate over the merits of the two systems was far-ranging. The level of minority representation on Council under PR was discussed openly in the public debate. This included religious, ethnic, racial and political minorities such as the Charter Committee. It is clear that under the 9X system, the influence of the Charter Committee cannot be substantially maintained without a coalition with either the Democratic or Republican Party.

20. In each of the repeal efforts in 1936, 1939, 1947, 1954 and 1957, identical arguments against Proportional Representation were made: PR is difficult to understand, difficult to administer, too expensive to count, results are delayed, voters are fractionalized into religious, geographic, racial, labor, and other interest blocs and the formula rather than the actual vote of the electorate determines the outcome of the election.

21. It is unlikely that race was a motivating factor in any campaign to repeal PR and to replace it with a plurality at-large system. Certainly in 1957, the City, controlled by five charterites with Charles Taft as the Mayor and Theodore Berry as Vice Mayor, did not in-

vidiously make race a motivating factor in the campaign to repeal PR.

22. Theodore Berry is an African American who served on City Council at the time of the 1957 campaign to repeal PR. In 1953 and 1955, Mr. Berry ran first among the candidates affiliated with the Charter Committee. The Charter Committee controlled the City.

23. Mayor Charles Taft was a strong supporter of PR. After PR was repealed in 1957, Mayor Taft, speaking as a disappointed champion of PR, opined that the "nastiest kind of anti-negro whispering campaign by the hard-core Republican precinct people" was responsible for the defeat of PR. There is no support in the record that any official of the City engaged in such conduct. In fact, there is information that Republican officials were aware of and sensitive to their obligation not to discriminate. See Plaintiffs' Ex. 89 in which Carl W. Rich recognizes his obligation to break segregation and takes credit for doing so in the debates held in 1954.

24. The repeal of PR can be attributed to objective factors such as low voter turnout at a special election; the deficiencies of PR; and partisan political interests. It is clear that the advocates of the at-large system intended the initiative be placed before the voters at the regular primary election held in May of 1956, not at the special election held September 30, 1957 as ordered by the Ohio Courts.

25. The City did not promote the at-large election system for the purposes of denying African Americans the right to vote or to dilute their right to vote for their representatives of choice.

26. The City did not invidiously inject race as an issue in the 1957 campaign to repeal PR.

27. The first City Council election held under the at-large system occurred on November 5, 1957. This

election resulted in an all-white, Republican dominated Council.

28. African Americans' electoral success was epitomized by Theodore Berry—an African American Council member—who was elected in the 1949, 1951, 1953, 1955, 1963, 1971 and 1973 Council elections. Mr. Berry has always publicly campaigned in support of PR to assure minority representation on Council, particularly by the candidates of the Charter Committee. Mr. Berry was strongly supported by African American voters and was a candidate of their choice. He is an outstanding public servant, well respected in the City of Cincinnati.

29. The Court finds it highly unlikely that the citizens of Cincinnati defeated PR because they were threatened by the fact that Theodore Berry could have been Mayor. Importantly, as the City at the time well knew, the person chosen to be Mayor by City Council was not consistently the top vote getter. Additionally, Mr. Berry did not aggressively seek the position of Mayor and he had represented the City already as Mayor during the absence of Mayor Taft as part of his duties as Vice-Mayor.

30. A whisper campaign was waged with Mr. Berry as the target during his re-election campaign for Council in 1957 to the effect that Mr. Berry was engaged personally in buying real estate for the purpose of re-locating African Americans throughout the City of Cincinnati. The whisper campaign was fueled by real estate agents and others who made a living buying and selling real estate. Their purpose was to induce individuals to sell at a lower price so that they could profit. It was not conducted by the City or any officials who had advocated for the repeal of PR. See Plaintiffs' Ex. 187 in which the author concluded that in the re-election campaign of Mr. Berry in 1957, there was no evidence to support a claim that the whispering campaign was an organized, directed effort.

31. In the early 1950's, life in Cincinnati was still largely segregated. Segregation had been the national policy of the United States since the abolition of slavery.

32. In the 1950's, Cincinnati's African American population grew.

33. In December 1956, the Supreme Court upheld the decision barring segregated buses in Montgomery, Alabama; in May 1957, Martin Luther King, Jr. led the largest post-war protest to demand equal voting rights; in August 1957, Congress passed the Voting Rights Act of 1957; and, on September 24, 1957, federal troops moved in to Little Rock to enforce school desegregation orders. These nationwide civil rights efforts increased racial consciousness on the local level in Cincinnati.

34. The official report of the Mayor's Friendly Relations Commission acknowledges that racial hostility grew in Cincinnati in the mid-through late 1950's.

35. Before 1957, the City recognized its obligation to end segregation. The efforts made by the City to open employment and housing opportunities to African Americans created racial tensions.

36. Specifically, racial tensions rose on a local level as African American citizens were being forced to move into previously white neighborhoods as a result of being displaced by the construction of the Interstate Highway through their neighborhood. The City addressed the issue through financial assistance and re-location services.

37. The plaintiffs have failed to prove by a preponderance of the evidence that the at-large election system was adopted by the defendants in 1957 with a racially discriminatory intent.

38. Since 1979, the City Council has considered several proposals to replace the at-large system. Such proposals were advanced, in part, to achieve proportional representation on Council for African Americans. This is a desirable goal.

39. The most serious recent attempt to modify the at-large system occurred in 1991, when a proposal to adopt a six district, three at-large seat plan was considered.

40. In 1980, the Charter Review Committee chaired by Theodore M. Berry could not reach consensus on any particular at-large election system. It did conclude that some type of at-large election system was desirable for the City of Cincinnati.

41. The City has never presented an alternative to the at-large system to the voters for their approval. (The proposal made in 1993 cannot be considered for any purpose in these proceedings). The City believes no alternative system would be adopted by the voters.

42. In the past five years, two citizen-initiated referenda have proposed changing the City's electoral system back to the PR system. Both the Democratic Party and the Republican Party oppose the PR system. Officially, the Charter Committee advocates the PR system.

43. In 1988, an estimated 76.6 percent of African American voters favored changing to PR, while only 32.8 percent of white voters did. Likewise, in 1991 an estimated 75.1 percent of African American voters supported a change to PR while only 32.8 percent of white voters did.

44. These 1988 and 1991 ballot initiatives indicate that African American voters support PR.

45. The Court finds no evidence to support a finding that the City or any of the defendants for any racially discriminatory purpose have refused to present a Charter Amendment changing the electoral system.

46. There is no political consensus in the Ctiy of Cincinnati as to whether the at-large system should be repealed or what electoral method should be used as its replacement.

47. According to the 1990 Census of the United States, the population of Cincinnati is 364,040 persons, of whom 220,285 are white (60.5 percent) and 138,132 are African American (37.9 percent). The Census shows that Cincinnati's total voting age population is 274,430, of whom 176,551 are white (64.3) and 91,909 are African American (33.5 percent). Whites constitute a majority of registered voters in Cincinnati. The Democratic Party is the predominant political party.

48. While the African American population of Cincinnati is dispersing, the African American population of the City is sufficiently large and geographically compact to constitute a majority in three of nine single-member districts.

49. From 1950 to 1990, Cincinnati's African American voting age population has more than doubled. In 1950, the African American voting age population was approximately 15 percent of the total voting age population; by 1990, the figure had increased to 33.5 percent. According to the Census of the United States, African Americans have constituted the following historic percentages of Cincinnati's population:

Year	Percent Overall	Percent Voting Age
1940	12.2%	11.5%
1950	15.5%	14.9%
1960	21.6%	19.8%
1970	27.6%	24.0%
1980	33.8%	29.9%
1990	37.9%	33.5%

50. African Americans usually turn out to vote in Council elections substantially the same as white voters. The African American turnout in the 1985 election was 27.4% compared to 29.4% for white voters. In the 1987 council election, 34.9% of African American voters turned out compared to 34.1% of white voters. In the

1989 election, 28.4% of African American voters turned out compared to 31.9% of white voters. Finally, in the 1991 Council election, at which Mr. Tillery was elected Mayor and Mr. Yates to Council, 32.8% of African American voters turned out to vote compared with 38.1% of white voters.

51. The racial composition of City Council elected under the at-large system since 1957 has been as follows:

Year	White	African American
1957	9	0
1959	9	0
1961	9	0
1963	8	1
1965	8	1
1967	8	1
1969	7	2
1971	7	2
1973	7	2
1975	9	0
1977	8	1
1979	8	1
1981	8	1
1983	7	2
1985	8	1
1987	8	1
1989	8	1
1991	7	2

52. Beginning with the 1957 Council election, no African Americans were elected to Council in the first six years after the repeal of PR even though African Americans comprised roughly 20 percent of the voting age population in 1960. Coincidentally, no African Americans were elected in the first six years after PR was initiated in 1924.

53. In the 35 years after the repeal of PR, eight African Americans have been elected to Council. They are:

Theodore Berry—elected in 1963, 1971 and 1973
Myron Bush—elected in 1965, 1967 and 1969
William Chenault—elected in 1969, 1971 and 1973
J. Kenneth Blackwell—elected in 1977, 1979, 1981, 1983, 1985 and 1987
Marian Spencer—elected in 1983
Reggie Williams—elected in 1989
Dwight Tillery—elected in 1991
Tyrone Yates—elected in 1991

54. Since 1957, three African Americans have been elected without first being appointed. These individuals are Mr. Berry who was first elected in 1963; J. Kenneth Blackwell who was first elected in 1977; and Marian Spencer who was elected in 1983.

55. The extreme case analysis also called the homogenous precinct analysis and the bivariate regressions analysis are accepted methods of analyzing racial voting patterns and were used by both experts who testified in this case. The parties agree that the preferred candidates are those ranked one through nine among the voters. The preferred candidates of African Americans were:

In 1981: McDowell, Mann, Sterne, Craig, Blackwell, Brush, Strauss, Bortz, Luken.

In 1983: Spencer, Mann, Sterne, Luken, Britton, Blackwell, Bortz, Strauss, Fellerhoff.

In 1985: Spencer, Mann, Luken, Sterne, Yates, Strauss, Blackwell, Bortz, Cissell.

In 1987: Yates, Mann, Luken, Sterne, Blackwell, Cissell, Strauss, Bortz, Fellerhoff.

In 1989: Williams, Mann, Luken, Sterne, Mallory, Booth, Strauss, Qualls, Guckenberger.

In 1991: Tillery, Yates, Mann, Sterne, Mirlisena, Strauss, Rosser, Rhodes, Qualls.

56. African American voters generally prefer to elect an African American candidate when the African Amer-

ican candidate is opposed by an equally qualified white candidate. Otherwise, African American voters vote for the person they perceive will serve their best interests without regard to the candidate's geographic origin or race. The candidate perceived by the voter who will serve that voter's best interest is that particular voter's candidate of choice. Race of the candidate is irrelevant.

57. African American voters in Cincinnati coalesce around types of candidates and are cohesive.

58. In the Council elections from 1983 to 1991, preferred candidates of the African American voters have been elected to Council even though they were not preferred candidates of white voters. In 1983, Ms. Fellerhoff and Ms. Spencer were preferred candidates of African American voters, not of white voters and were elected. In 1987, 1989, and 1991, Ms. Sterne was a preferred candidate of African American voters, not of white voters, and was elected. In 1991, Mr. Yates was a preferred candidate of the African American voters, not of white voters, and was elected.

59. In the four most recent City Council elections African American voters' most preferred candidate has been an African American. In three out of the four elections, African American voters have selected three African American candidates among their top nine choices. (These were the elections of 1985, 1989 and 1991). In the 1987 election, African American voters chose two African American candidates among their top nine choices.

60. White voters have never included more than one African American candidate among their top nine choices. Marian Spencer and Tyrone Yates were both defeated in 1985 and 1987, respectively, in spite of being the top vote getters among African American voters.

61. In all the elections studied, three African American candidates were preferred by white voters—J. Kenneth Blackwell, Reggie Williams, and Dwight Tillery.

Each of these candidates was an incumbent. Incumbency and performance in office are the greatest assets in being elected to City Council. Except for Mr. Blackwell, no African American candidate has received more than 50 percent of the white vote in any of these elections.

62. In 1983, 1985 and 1987, the only African American candidate ranked among white voters' top nine choices was J. Kenneth Blackwell. Mr. Blackwell was a conservative incumbent Republican, who in relative terms received less support from the African American voters than he did from white voters.

63. In 1989, the only African American ranked among white voters' top nine choices was Reggie Williams. Mr. Williams is a former Cincinnati Bengals football star, and was an appointed incumbent when elected.

64. In 1991, the only African American among white voters' top nine choices was Dwight Tillery. Mr. Tillery was also an incumbent by appointment and excelled in his performance as a City Councilman. He was supported by the Democratic Party, the predominant political party in the City.

65. In the elections studied, Mr. Tyrone Yates was the only African American to be elected to Council who was not among the top nine choices of whites. In 1991, he was elected to the ninth seat. He was an incumbent who performed excellently as a Councilman and was supported by the Charter Committee which has had great success in electing its endorsed candidates particularly beginning in the early 1920's until its coalition with the Democratic Party was dissolved in 1985.

66. Ms. Spencer served only one term on Council. She was not elected to Council in 1985 despite finishing first among African American voters that year with over 70 percent of the African American vote because, as a Charter Committee candidate, she did not receive the support

of the Democratic Party. The Democratic Party had dissolved the coalition with the Charter Party that year.

67. In all but one election, every candidate who was ranked sixth or higher by white voters gained a seat on Council. The exception was 1991, when the 5th-ranked candidate among white voters was defeated. In addition, every candidate who received 50 percent or more of the white vote from 1981 through 1991 was elected.

68. Conversely, white candidates preferred by white voters were elected even though they received less than 20% of the African American vote.

69. The largest number of African Americans elected in a single election since 1957 has been two. Usually, one African American candidate has been elected. In the past twenty years, only twice have two African Americans been elected to Council in the same election. Two African Americans were elected in 1973, but in the following 1975 election, an all-white Council was elected. In the next three elections—1977, 1979 and 1981—only one African American was elected to Council. Two African Americans were elected in 1983, but in 1985, 1987 and 1989 only one African American was elected.

70. African Americans in Cincinnati are disadvantaged, as compared to whites, in the areas of income, education, employment and housing. Specifically, African Americans on average have less than half the per capita income of whites in Cincinnati, and African Americans are 2.7 times more likely than whites to live below the federal government's poverty line. The unemployment rate among African Americans is more than twice the rate for whites, and African Americans who are employed are much less likely than whites to be white collar professionals. African Americans are also much less likely than whites to have high school degrees or a college education. In the area of housing, whites are much more likely to own their own homes than African Americans,

and whites' homes are, on average, more valuable. African American renters tend to occupy units of lower quality than whites.

71. There is a link between socioeconomic status and effective political participation through economic pressure. Lower levels of socioeconomic status make African Americans much less able than whites to influence the political process through economic power.

72. Campaigning is costly under any election system including the 9X system. Running for City Council takes both time and money, and time away from the job means loss of income. Council candidates, both successful and unsuccessful, have either lent or contributed significant sums of their own (or their families') money to their campaigns. Candidates who have personal wealth have advantages over candidates who do not.

73. While the effects of discrimination in such areas as education, employment and housing do hinder the ability of some African Americans personally to finance political campaigns, the defendants have neither created these conditions nor do they intentionally maintain them.

74. While the African American community has less money to give to support political candidates, African American candidates have been able to raise significant funds from the white community and have merited serious attention. African American as well as white candidates have successfully raised funds and, at least, of equal importance, support and votes from both white and African American citizens.

75. The Charter Committee, the Democratic Party and the Republican Party have realized the compelling need to gain the support of the African American community and encourage African American participation in City politics by making conscious efforts to recruit and elect African American candidates and to involve African Americans in the political process. The City recognizes

the need and its constitutional responsibility to respond to the needs of the African American community and to its wishes insofar as it can within the law.

76. The African American community is such a large constituency that candidates who ignore the issues and concerns of that community and do not campaign there during the election do so at their own peril.

77. In the six council elections from 1981 to 1991, there have been 29 African American candidates. Of those 29, only four have run for Council more than once. Of those four, three have been elected to Council.

78. Successful African American candidates have been appointed incumbents, have served the City well as Councilmembers, have campaigned throughout the City, have addressed the concerns of each neighborhood, have raised substantial campaign funds and have been supported and endorsed by one of the City's political parties or the Charter Committee.

79. The Democratic Party, the Republican Party and the Charter Committee are responsible for endorsing candidates for City Council. These three have included African Americans in the endorsement process. Further, all three groups actively seek African American candidates to endorse.

80. The endorsement process in the Democratic Party, Republican Party and Charter Committee is open to and participated in by African Americans.

81. The Court notes that two of the plaintiffs, Mr. Mallory and Mr. Bowen, are prominent elected officials and leaders in the Democratic Party.

82. The evidence shows that election to City Council is very difficult without the endorsement and political support of one of the political parties/committee in Cincinnati. Each has its own individual endorsement processes. Each has a "Nominating Committee" that recommends candidates for endorsement. The decisions of the Nominating Committees are generally subject to

approval by the highest levels of party leadership, generally the party chair.

83. African Americans have not been denied access or participation in the candidate endorsement process of either political party or the committee.

84. Plaintiff State Representative William Mallory, Sr., an African American, held such a position with one of the political parties; he was Co-Chairman of the Hamilton County Democratic Party for one year in 1991. At that time, the responsibility for final decisions regarding the endorsement of candidates was with the Cincinnati Democratic Committee ("CDC") rather than the county-wide organization. Timothy Burke who is white was the Chairman of the CDC. The CDC has since been relieved of its responsibilities for endorsement of Council candidates by the Hamilton County Democratic Party, which now controls the process. The current Chairman of the Hamilton Democratic Party, Thomas Luken, is white.

85. The political parties and the Charter Committee seek electable candidates through informal "screening" processes with respect to granting party endorsements and political support. All candidates must satisfy the political leaders' criteria for endorsing and supporting candidates. The primary criterion upon which endorsement decisions are made is the electability of the prospective candidate. Two factors are viewed as central to the electability of a candidate under the 9X system: name recognition and fund raising capabilities.

86. Regardless of race, name recognition is usually achieved through incumbency, by running strong campaigns for City Council in one or several successive elections and or by performing newsworthy accomplishments.

87. The African Americans elected to Council were African Americans that were supported by one of the political parties or the Charter Committee.

88. Appointment to a vacancy on City Council is the easiest method by which candidates gain the name rec-

ognition necessary to win election to City Council. The appointment process is more tightly controlled by party leadership than the processes for endorsing and supporting candidates. The appointment decision is made by the "successor-designates" that each newly elected Councilmember chooses upon assuming his/her office. The newly elected member always chooses the other members of his or her party or committee as the "successor-designates" so that, in effect, the decision to fill a vacancy on Council is left to the incumbent Councilmembers of the same party or committee as the departing member.

89. Once a vacancy occurs, the incumbent Councilmembers consult with their party or committee leadership regarding the appointment. The process by which the appointment decision is made varies from case to case, but usually a number of candidates are interviewed, and the party or committee chair and the incumbent councilmembers control the decision regarding the appointment.

90. The primary criteria upon which appointment decisions are made are identical to those for party endorsement and support.

91. The appointment process has been open to and actively participated in by African Americans. Since the adoption of the at-large system, the following African Americans have been appointed to vacancies on City council:

Year	Candidate
1965	Myron Bush
1968	William Chenault
1969	Arthur Reid
1971	Theodore Berry
1975	Dwight Tillery
1978	T. X. Graham
1988	Reggie Williams
1989	Paul Booth
1991	Tyrone Yates
1991	Dwight Tillery

While on Council, each African American Councilmember appointed his successor-designate. While the last appointee to City Council is white, he was appointed at the insistence of Mayor Dwight Tillery.

92. For many years the City of Cincinnati followed racially discriminating employment practices. An April 17, 1992 report entitled *City of Cincinnati Croson Study* ("*Croson Study*"), prepared for the City and co-authored by Dr. Alfred J. Tuchfarber, states that: "Racial discrimination in employment has been a notable part of Cincinnati's history." *Croson Study* at 36. The *Croson Study* concludes;

> Local governments, as well as businesses in the greater Cincinnati area have a long history of discriminatory practices in hiring, promotion, and the awarding of contracts. This historical review of discrimination is by no means comprehensive but it does present an accurate account of racial and gender discrimination in the Cincinnati area. *Id.* at 62.

93. The Cincinnati Police Division ("CPD"), which is operated and maintained by the City, operates under two consent decrees entered into by the City after race discrimination suits were brought against it. In *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 86 (1992), the Sixth Circuit accepted the City's own admission of "wide statistical disparities" between the City's labor force and the racial composition of the CPD as sufficient evidence of past discrimination to justify the City's affirmative action programs. *Id.* at 599-600.

94. The Cincinnati Fire Division ("CFD") also operates under a consent decree, entered into on May 7, 1974 after a race discrimination suit was brought against it. The Court takes judicial notice of *Youngblood v. Dalzell*, 804 F.2d 360 (6th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987), where the Sixth Circuit recog-

nized that "patterns of racial segregation that gave rise to this decree" were sufficient to uphold its provisions. *Id.* at 365.

95. On June 14, 1990, the City received from the Ohio Civil Rights Commission a "Notice of Non-Compliance and Recommendations," stating that the City had failed to meet its statutory obligations for minority hiring. The City admits in its own study of its affirmative action program for January-June 1991 that it will not meet its quantitive [*sic*] goals with respect to hiring minorties in 1992. Moreover, the same affirmative action study shows that African Americans are employed by the City in positions of less responsibility than whites. African Americans represent 56.6% of "Service Maintenance" employees and 50.8% of "Office Clerical" employees, while only 18.9% of "Officials/Administrators" and 19.0% of "Professionals" are African American.

96. Past geographic, religious, social, and racial isolation and the City's own practices have had a discriminatory impact upon minority contractors. *See, R.K.R., Inc. v. City of Cincinnati,* Civil Action No. C-1-89-025, 1989 U.S. Dist. LEXIS 16997 (S.D. Ohio Oct. 3, 1989). The *Croson Study* also supports this conclusion. *Id.* at 56-60. Additionally, the *Croson Study* concludes that the City's current affirmative action program has failed to eradicate racial discrimination against minority contractors in several respects, most significantly the large number of minority contractors who have failed to achieve certification by the City. *Id.* at 204-06.

97. The history of discrimination in education is also well documented. In settlement of a suit alleging maintenance of segregated schools, the Cincinnati Board of Education entered into a settlement agreement in 1984 requiring an end to patterns of "racial isolation" in the Cincinnati Public Schools. Discriminatory patterns in the hiring of teachers and staff by the Cincinnati Public Schools have existed. *Croson Study* at 60-61.

98. In a consent decree entered in 1984, the Cincinnati Metropolitan Housing Authority ("CMHA") admitted that public housing in Cincinnati was provided on a racial basis prior to 1984, and that, as of 1984, racial imbalances still existed in CMHA housing.

99. African American citizens continue to bear the effects of the long history of societal discrimination in Cincinnati. The State of Ohio has admitted that the continuing effects of discrimination are present throughout the state.

100. The City's approach to dealing with issues of concern to the African American community displays a consistent pattern of responsiveness to those concerns. The City has made good faith efforts to address those concerns. Certainly, one cannot be faulted for resorting to the Courts to settle disputes. This pattern of behavior on the part of the City to settle these lawsuits constitutes significant responsiveness to the issues of concern to the African American community.

101. The 52 Community Councils are heard at City Hall. The creation of the Office of Municipal Investigation, the Black Business Incubator, the Capital Venture Program are examples of the City's responsiveness.

102. Although the City was aware of the African American community's concerns about the racial composition of the CPD and CFD, it could take little action to correct alleged job discrimination in the City's safety forces because of the Civil Service laws until the U.S. Department of Justice (in the case of the CPD) or African American individuals (in the case of CFD) filed race discrimination lawsuits which gave the federal courts jurisdiction and the parties authority through a settlement to impose affirmative corrective measures in spite of the State Civil Service laws.

103. The African American community complained about the City's practices in hiring minority contractors.

In 1978 the City passed an ordinance requiring compliance with a federal minority contracting quota.

104. Since 1975, when no African Americans were elected to City Council, the African American community has vocally protested that the at-large election system dilutes their voting strength, and has demanded change. The City Council has debated the issue a number of times and several proposed ordinances have been before the Council. Councilmembers have made statements supporting change and decrying the lack of minority proportional representation on City Council.

105. The African American community and the Charter Committee tried, through support of two petition drives, to amend the City Charter by the initiative process, but both were rejected by white voters.

106. In spite of this apparent pressing concern the continuation of the 9X system has for the African American voters, which should have been well-known by all voters by at least 1975, no lawsuit was filed until after the Democratic Party dissolved the coalition with the Charter Committee and the Charter Committee's influence in councilmanic politics was thereby diminished.

107. In the mid-1980's, the Rainbow Coalition reviewed the Cincinnati voting system with the intent to file a lawsuit and decided against it.

108. The City has not maintained the current 9X system with the intent to exclude or limit the right of African Americans to vote or to exclude or limit the influence of the African American community.

109. While the City, being misled by the past national policy of the United States supporting segregation which existed during the first half of this century, has had a history of discrimination in the areas of jobs, education, accommodation and housing, its discrimination has not touched the right of African American citizens to register, to vote, or otherwise to participate in the electoral process.

110. The City does not have a majority vote requirement, any anti-single shot provision or other voting practice or procedure that may enhance the opportunity for discrimination against African American voters.

111. African American candidates have been elected to City Council in every recent election. In 1991 the top vote getter and thus Mayor is an African American.

112. There has not been a lack of responsiveness to the particularized needs of the members of the African American community on the part of elected officials.

113. The City has been cognizant of the needs of the African American community and has attempted to address those needs.

114. There is no evidence that the City has erected any direct barriers to the right of any citizen to vote.

115. The City has not had any history of official discrimination denying the right of African Americans to register, to vote, or to participate in the democratic process. There are no officially sponsored practices or procedures required in Council elections that enhance the opportunity for discrimination against African Americans.

116. In 1987, the Baptist Ministers Conference endorsed and supported: Charlie Luken, Ken Blackwell, David Mann, John Mirlisena, Guy Guckenberger, Peter Strauss, Arn Bortz, Bobbie Sterne and Tyrone Yates. Eight (8) of the nine (9) of those endorsed candidates were elected. In 1989, the Conference endorsed and supported: Charlie Luken, Guy Guckenberger, David Mann, Reggie Williams, Peter Strauss, John Mirlisena, William Mallory, Jr., Paul Booth and Len Garrett. Six (6) of nine (9) of those endorsed candidates were elected. In 1991, the Conference endorsed and supported: Dwight Tillery, Guy Guckenberger, David Mann, John Mirlisena, Roxanne Qualls, Tyrone Yates, Shirley Rosser, Len Garrett, Bobbie Sterne and Virginia Rhodes. Six (6) of nine (9) of those endorsed candidates were elected. In

those three elections, 1987, 1989, and 1991, twenty (20) of twenty-seven (27) (74%) endorsed candidates were elected to Council. As Reverend Milton, one of the plaintiffs, testified, "[t]hat's a pretty good record."

117. The Senate Judiciary Committee Report relating to the amending of Section 2 of the Voting Rights Act, specifically discusses Cincinnati. The Senate Report states:

> Cincinnati was the subject of one of the most detailed investigations of the entire study [Department of Justice Study conducted in 1978]. The report of the study is squarely stated:
>
> > In like [sic] manner, Cincinnati, Ohio, was the subject of a vote dilution investigation by the Civil Rights Division but once again, the Division did not discover the facts necessary to institute a lawsuit under the *White v. Regester* [412 U.S. 755 (1973)] standard.
>
> The 1978 Justice Department investigation also encompassed over half of the cities mentioned in the Subcommittee Report, and two of the cities cited by the Subcommittee were the subject of the more detailed Justice investigations. Cincinnati and Waterbury, Connecticut, where, again, no potential dilution case under the results standard was found.
>
> * * * *
>
> The Committee has been well aware of the great importance of this issue and accordingly has examined it at great length. However, it concludes as it did in the House Judiciary Committee, that the amendment to Section 2 is careful, sound, and necessary and will not result in wholesale invalidation of electoral structures.

Senate Report No. 97-417, page 213

118. In six councilmanic eelctions from 1981 to 1991, preferred candidates of African American voters usually were elected to Council. In 1981, seven (7) of nine (9) preferred candidates of African American voters were elected to Council. In 1983, eight (8) of nine (9) preferred candidates of African American voters were elected to Council. In 1985, six (6) of nine (9) preferred candidates of African American candidates were elected to Council. In 1987, six (6) of nine (9) preferred candidates of African American voters were elected to Council. In 1989, six (6) of nine (9) preferred candidates of African American voters were elected to Council. In 1991, seven (7) of nine (9) preferred candidates of African American voters were elected to Council. In those six (6) elections, forty (40) of fifty-four (54) (74%) of the preferred candidates of African American voters were elected to Council. To coorborate this success, eighteen (18) of twenty-four (24) (75%) of the preferred candidates of African American voters receiving more than 50% of the estimated African American vote cast in the councilmanic elections from 1983 to 1991 were elected to Council.

119. Exogenous elections qualify as a local appraisal of minority voting because they reflect local voting patterns. The Court has examined exogenous elections and finds that African American voting strength in Cincinnati is potent. Certainly, it is not powerless. Tax levies cannot pass without African American voters' support. The Cincinnati School Board elections, which are at-large from the same approximate geographic area, have also demonstrated the ability of African American voters to elect candidates of their choice. Such evidence demonstrates that African American voting strength is not overwhelmed by any legally significant majority block voting.

120. To the extent that any of the foregoing Findings of Fact contain any conclusions of law, they shall to that extent be deemed Conclusions of Law, and to the extent

any of the following Conclusions of Law contain any findings of fact, they shall to that extent be deemed Findings of Fact.

III. *CONCLUSIONS OF LAW*

1. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343, 1344, 2201, 2202 and 42 U.S.C. § 1373j(f).

2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b).

3. The adoption or maintenance of an electoral scheme with racially discriminatory intent by political subdivisions of a State constitutes a violation of both the Fourteenth and Fifteenth Amendments to the United States Constitution. *Mobile v. Bolden*, 446 U.S. 55 (1980). Voting schemes which dilute African American voting strength violate the Fourteenth and Fifteenth Amendments if they were conceived or are operated by a political subdivision of a State as a purposeful device to further racial discrimination by minimizing, cancelling or diluting the voting potential of racial minorities. *Rogers v. Lodge*, 458 U.S. 613, 618 (1982); *Mobile*, 446 U.S. at 66; *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971).

4. Electoral systems which intentionally dilute African American voting strength also violate Section 2 of the Voting Rights Act. S. Rep. No. 417, 97th Cong., 2d Sess. 27 (1982).

5. An objective determination of discriminatory intent is achieved through a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. *Rogers*, 458 U.S. at 618, quoting *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977). The factfinder must consider the "aggregate" of evidence. 458 U.S. at 622. The Supreme Court instructs that information such as the relative impact of the action, the historical background, and the specific se-

quence of events leading to the decision may be considered as evidence of intent. *Rogers*, 458 U.S. at 623-26; *Arlington Heights*, at 266-67. Both *Rogers* and *Mobile* clearly instruct that evidence of discriminatory effect will not by itself render an electoral system unconstitutional. The Supreme Court instructs, however, such discriminatory effect may be considered in determining the issue of purposeful discrimination. *Rogers*, 458 U.S. at 624. On the other hand, the Voting Rights Act is specifically designed to remedy electoral systems which have a discriminatory effect on the right of minorities to elect representatives of their choice even though the political subdivision has no invidious purpose.

6. Evidence of nonracial purposes or explanations will not validate an act that was passed with a racially discriminatory motive, that is, race discrimination was a reason of the political subdivision of the State for its actions. *Id.* at 618; *Arlington Heights*, 429 U.S. at 265-66.

7. Courts are not limited in the types of evidence they may evaluate to discern discriminatory motive. *Rogers*, 458 U.S. at 621-22. The weight of such evidence and the inferences which may be drawn from the evidence are functions of evidentiary quality rather than quantity.

8. Evidence of discriminatory motive includes racially inflammatory statements.

9. An invidious purpose may be inferred from the totality of the relevant facts, including facts, if true, such as the law bears more heavily on one race than the other; newspaper evidence that an at-large system was promoted as a means to prevent "political dictatorship" and "bossism"; . . . and campaign propagandizers, while refraining from making patently racist remarks, continually reminding the Voters to keep our city government in the hands of all the people and emphasize the fact that a majority of council members. . . would be voted on by each person.

10. The historical context surrounding the challenged enactment is also probative of discriminatory intent. *Arlington Heights,* 429 U.S. at 266. In *Hunter v. Underwood,* 471 U.S. 222, 228-29 (1985), the Court found that the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise African Americans and was sufficient to find that race was a motivating factor. In *Brown v. School Commissioners of Mobile County,* 706 F.2d 1103 (11th Cir.) *aff'd,* 464 U.S. 1005 (1983), the Court found that an at-large electoral system adopted in the context of white backlash to Reconstruction was probative of discriminatory intent, when, in fact, the adoption of an electoral scheme caused a decrease, or retrogression in African American voting strength.

11. Official action will not be held unconstitutional, however, solely because it results in a racially disproportionate impact. *City of Mobile v. Bolden,* 446 U.S. 55, 69-70 (1980), quoting *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 264-265 (1977).

12. The referendum process may not be used to legitimate an unconstitutional act. *Hunter v. Erickson,* 393 U.S. 385 (1969).

13. While racially inflammatory rumors were circulated in connection with the 1957 re-election campaign of Theodore Berry to City Council in the November 1957 election, race-based arguments against PR were not used by the City or the officials who advocated for the repeal of PR in the public debate concerning the special election to repeal PR held September 30, 1957.

14. While racial tensions were high in certain regions of the United States in 1957, racial tensions were not high in the City of Cincinnati prior to September 30, 1957 after 32 years under the PR system.

15. It is impossible under our system of election by secret ballot to determine whether individual voters har-

bored discriminatory intent when voting on facially neutral issues. The motive of voters in casting their particular votes is irrelevant to the inquiry before this Court.

16. The Sixth Circuit's decision in *Arthur v. City of Toledo,* 782 F.2d 565 (6th Cir. 1986) instructs that the fact that some individuals made racial slurs in contacts and meetings leading to an election is insufficient evidence to find the issues approved at such an election unconstitutional.

17. Careful scrutiny of referenda is required, however, where the fundamental constitutional right to vote is involved. In *Lucas v. Forty-Fourth General Assembly of Colorado,* 377 U.S. 713, 736-37 (1964), the Supreme Court held that,

> [a]n individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of the State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause . . . . 'One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.' A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be [quoting *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 638 (1943)].

This principal [*sic*] applies with even greater force if a voting system places special burdens on a racial minority's ability to affect political processes and outcomes. *Washington v. Seattle School District No. 1,* 458 U.S. 457 (1982). If a racial group is relegated to a position of political powerlessness, it is entitled to extraordinary protection from the majoritarian political process. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 28 (1973).

18. At-large elections are not *per se* illegal. *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986).

19. The plaintiffs carry the burden of proving that a multi-member district unconstitutionally operates to dilute or cancel the voting strength of racial or political elements. Justice White observed in 1971, "We have not yet sustained such an attack." *Whitcomb*, 403 U.S. at 144 (1971).

20. Intentional discrimination claims brought under the Fifteenth Amendment and the Voting Rights Act are likewise established through all the evidence, including the normal inferences to be drawn from the foreseeability of defendant's action. S. Rep. No. 417, 97th Cong., 2d Sess. 27 n.108, *reprinted in* 1982 U.S. Code Cong. & Admin. News 205 ("S. Rep.") (*citing Arlington Heights*, 429 U.S. at 264-68).

21. In this case, the weight of objective evidence clearly indicates there was no presence of discriminatory intent on the part of the City in the special election held September 30, 1957 at which PR was repealed.

22. The Court concludes that the repeal of PR and the adoption of the at-large system was not for an intentional discriminatory purpose. *Mobile v. Bolden*, 446 U.S. 55 (1980); *Arthur v. City of Toledo, Ohio*, 782 F.2d 565 (6th Cir. 1986).

23. Additionally, plaintiffs must also show a quantum of injury to establish a constitutional and Section 2 violation. Some showing of injury must be made to assure that the district court can impose a meaningful remedy. *Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991).

24. Electoral systems that—even if not adopted with discriminatory intent—are maintained with discriminatory purpose are unconstitutional. *Rogers*, 458 U.S. at 613. The most probative evidence of intent is objective evidence of what actually happened rather than evidence

describing the subjective state of mind of the actor. *Washington v. Davis,* 426 U.S. 229, 253 (1976) (Stevens, J., concurring). *See also Columbus Board of Education v. Penick,* 443 U.S. 449, 464 (1979) ("actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose.")

25. A discriminatory system maintained not as a result of an official body's action, but because of its *failure* to act does not immunize it from a constitutional challenge or a challenge under Section 2 of the Voting Rights Act. As *Penick* noted in the context of school desegregation "[a]dherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance . . . is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn." *Id.* at 465. *See also NAACP v. Lansing Board of Education,* 559 F.2d 1042, 1047-48 (6th Cir.), *cert. denied,* 434 U.S. 997 (1977) (the court must be "free to draw an inference of segregative intent or purpose from a pattern of official action or inaction which has the natural, probable and foreseeable result of increasing or perpetuating school segregation").

26. The intentional maintenance of a racially discriminatory electoral system is a constitutional violation even if officials are motivated by political self-interest rather than racial malice.

27. The plaintiffs have failed to prove by a preponderance of the legal evidence that the City adopted and has maintained the at-large election system or 9X as it is today with invidious racially discriminatory intent. This conclusion does not end this Court's inquiry because under Section 2 of the Voting Rights Act, plaintiffs need only demonstrate that the election system has a discriminatory effect. *Thornburg v. Gingles,* 478 U.S. 30, 43-44 (1986); S. Rep. at 2.

28. In *Thornburg v. Gingles,* 478 U.S. at 47, the Supreme Court stated that "[t]he essence of a Section 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." At-large electoral systems while not a *per se* violation frequently have such an effect by submerging the voting strength of a minority group in a majority electorate. *Id. See also Growe v. Emison,* 507 U.S. ——, 113 S.Ct. 1075, 1084 (1993). ("We have . . . stated on many occasions that multimember districting plans, as well as at-large plans, generally pose greater threats to minority-voter participation in the political process than do single-member districts.")

29. In order to establish that the 9X system of electing Council in the City of Cincinnati constitutes a Section 2 violation, plaintiffs must prove three necessary preconditions. Unless there is a conjunction of these circumstances, the 9X system will not be found to impede the ability of African American voters in Cincinnati to elect representatives of their choice. *Thornburg v. Gingles,* 478 U.S. 30, 48 (1986). First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. Second, the minority group must be able to show that it is politically cohesive. Third, the minority group must be able to demonstrate that the majority group votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority group's candidate runs unopposed—usually to defeat the minority group's preferred candidate. *Thornburg v. Gingles,* 478 U.S. at 51.

30. "[T]hese circumstances are necessary preconditions for multimember districts to operate to impair minority voters' ability to elect representatives of their choice . . .". *Thornburg v. Gingles, Id.* 478 U.S. at 50; *Overton v. City of Austin,* 871 F.2d 529, 538 (5th Cir. 1989).

31. To establish a violation of Section 2 of the Voting Rights Act, the plaintiffs must prove by the preponderance of the evidence that the electoral system dilutes the votes of a protected minority group and makes it more difficult for members of the minority group than for other members of the electorate to elect representatives of their choice. In reaching its conclusions, the trier of facts must consider the totality of circumstances, *Gingles,* 478 U.S. at 36; 42 U.S.C. § 1973(b).

32. The parties have stipulated that the African American population in Cincinnati is sufficiently large and geographically compact to constitute a majority in at least three of nine single-member districts. This first *Gingles* factor requires the minority group ordinarily to be able to draw a singlemember district in which a majority of the voting age population is comprised of minority group members. *Westwego Citizens for Better Gov't v. Westwego,* 872 F.2d 1201 (5th Cir. 1989). In view of the agreement of the parties, the Court concludes that plaintiffs have satisfied this first threshold criteria.

33. To pass the second *Gingles* threshold inquiry, plaintiffs must prove that the minority group of which they are members is "politically cohesive." As the United States Supreme Court stated in *Gingles*:

> If the minority group is not politically cohesive, it cannot be said that the selection of a multi-member electoral structure thwarts distinctive minority group interest.

478 U.S. at 51.

34. Political cohesiveness is related to, but distinct from, the concept of legally significant racially polarized voting. The notion of political cohesiveness contemplates that specified group of voters shares common beliefs, ide principles. agendas, concerns, and the like such that they generally unite behind or coalesce around particular candidates and issues. *Monroe v. City of Wood-*

ville, 881 F.2d 1327, 1331 (5th Cir. 1989), *modified* 897 F.2d 763, *cert. denied,* —— U.S. ——; 111 S.Ct. 71; 112 L.Ed.2d 45 (1990).

35. Political cohesiveness exists when an identifiable minority group of voters votes differently than an identifiable majority group. *See Gingles,* 478 U.S. at 53 n.21 (citations and internal quotations omitted).

36. To determine political cohesiveness one looks only to the difference between how majority votes and minority votes were cast; it does not ask why those votes were cast the way they were.

37. Plaintiffs have demonstrated by the preponderance of the evidence that in City Council elections, African Americans are a political cohesive group in that a significant number of African American voters generally vote for the same candidates. The Court concludes that Plaintiffs have satisfied this second threshold criteria.

38. The historic pattern of majority bloc voting over a number of elections is more probative of the existence of legally significant polarization than the results of a single election. 478 U.S. at 57.

39. The race of the candidate *per se* is irrelevant to the majority bloc voting analysis. To establish a violation under § 2, the plaintiffs must prove by the preponderance of the evidence that they have less opportunity than other members of the electorate to elect representatives *of their choice.* The fact that race of voter and race of candidate is often correlated is not directly pertinent to a § 2 inquiry. It is the *status* of the candidate as the *chosen representative of a particular racial group,* not the race of the candidate that is important. Only the race of the voter, not the race of the candidate, is relevant to the vote dilution analysis. 478 U.S. at 68.

40. Racially polarized and racial bloc voting mean the same. 478 U.S. at 52 n.18.

41. The degree of majority racial bloc voting which constitutes the threshold of legal significance varies from political subdivision to political subdivision.

42. Plaintiffs have repeatedly referred to African American voter preference for greater racial diversity on Council. "Racial diversity" in this context is merely a euphemism for proportional representation. While African American voters may express a preference for proportional representation, the Voting Rights Act instructs that African American voters in Cincinnati have no federal statutory or constitutional right to elect numbers equal to their proportion in the population.

43. It is ". . . the usual predictability of the majority's success [that] distinguishes structural dilution from the mere loss of an occasional election." *Thornburg v. Gingles, Id.* at 51. "[U]nless minority group members experience substantial difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability 'to elect'." *Thornburg v. Gingles, Id.* at 48, n.15.

44. The factors to be examined in determining the amount of majority bloc voting necessary to minimize or cancel the minority vote and thus become legally significant include: (1) the nature of the allegedly dilutive electoral mechanism (here, the 9X election system); (2) the presence or absence of other potentially dilutive electoral devices (here, none); (3) the percentage of voters in the district who are members of the minority group (here, 34%); (4) the size of the district involved (here, the City of Cincinnati, population 364,040); and (5) the number of positions open and the number of candidates in the field (here, nine seats each election, with an average of 23 candidates from 1981 to 1991). *Thornburg v. Gingles, Id.* at 56; *Mallory v. Eyrich,* 707 F.Supp. 947, 951 (S.D. Ohio 1989).

45. The perversion of legally significant majority bloc voting is not only the deprivation of preferred representa-

tives being elected, it also "allows those elected to ignore [minority] interests without fear of political consequences." *Thornburg v. Gingles, Id.* at 48 quoting *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). Cincinnati Councilmembers consistently testified that they cannot ignore the interests and concerns of the African American community without fear of political consequences. Legally significant majority bloc voting is not perverting Council elections nor the responsiveness of Councilmembers to the concerns of African American voters in the City of Cincinnati.

46. Several comments by the Senate committee instruct the Court as follows. First, no group has a right to proportional representation and, second, at-large systems are not *per se* a violation of the Act. S.Rep. at 23-24. Third, § 2 was not intended by Congress to require racial quotas in local governments. *Id.* at 27. Finally, and most importantly, under the results test, a plaintiff who establishes only the existence of at-large voting, underrepresentation of minorities, and one additional relevant factor, such as here, the vestiges of segregation in jobs, housing, and educational opportunities has *not* sufficiently shown a violation of the Act. *Id.* at 33.

47. It is only when the totality of the circumstances establishes that a particular voting procedure has a discriminatory result that a court may find a violation of the Act. *Buchanan v. City of Jackson*, 683 F.Supp. 1515 (W.D. Tenn. 1988). Under the totality of circumstances inquiry in this case, the focus is on whether there is legally significant majority polarized voting. When the pattern of majority polarized voting is severe—that is, when minority and majority voters rarely engage in cross-over voting—an at-large election scheme is more likely to dilute minority voting strength in violation of Section 2. Conversely, when the pattern of majority polarized voting is slight, and there is substantial cross-over voting between minority and majority voters, an at-large election scheme does not dilute minority voting strength in violation of Section 2.

48. After a searching practical evaluation of the past and present reality and taking a functional view of the political process in Cincinnati, the Court concludes that African Americans have been elected to Council. African Americans have also been successful in other district and at-large elections in the City of Cincinnati, e.g., Cincinnati Board of Education, the Ohio House and Senate elections. African Americans have not been excluded from the political process. African Americans are an integral part of the two political parties and the Charter Committee. African Americans are registered to vote in substantial percentages. While African American voters' turnout in Council elections is slightly below white voters, this difference is insignificant on a comparative basis. The political process leading to election of Council, including nominating committees, candidate recruitment, candidate election and support for candidates is equally open to African Americans. African American voters have successfully elected preferred candidates to Council. Losses by some of the preferred candidates of African American voters result from politics rather than race. Under the totality of the circumstances, the 9X system of electing Council does not impair or impede the ability of African Americans to have an equal opportunity to participate in the political process and to elect candidates of their choice.

49. In making a practical evaluation of the political reality it is appropriate to consider the testimony of councilmembers revealing how they view themselves as representatives of the African American community. *Collins v. City of Norfolk*, 883 F.2d 1232, 1238 (4th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990). Congressman David Mann, Mayor Dwight Tillery, Mr. John Mirlisena, Ms. Roxanne Qualls, Mr. Peter Strauss, Mr. Tyrone Yates and Ms. Bobbie Sterne have all testified unequivocally that they are repesentatives of the African American community. Skin color is not the basis of representation for any of these distinguished elected officials. Instead, rep-

resentation consists of articulating, addressing, supporting and advocating the constituents' interests, issues, projects and concerns. It is the Councilmembers' status not their race that is relevant.

50. Over their long service on Council, Mr. Mann, Mr. Strauss and Ms. Sterne have consistently advocated and effectively represented the African American community of the City of Cincinnati.

51. Clearly, these elected Councilmembers have served the African American community as their elected representatives of choice. This conclusion is supported by the continued large percent of the vote they receive from the African American community.

52. The totality of the circumstances include the following factors. There is no requirement that any particular number of the following factors be proved, or that a majority of them point one way or the other.

a. There is no evidence of any history of official discrimination by the City that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

b. Majority polarized voting is not legally significant, however, the voting pattern of African Americans does establish African Americans are politically cohesive in casting their votes for candidates for Council;

c. There is no evidence that the City has used oppressive signature requirements for nominating petitions, majority vote requirements, primaries, anti-single shot provisions, literacy tests, poll taxes, real estate ownership requirements or other voting practices or procedures that may enhance the opportunity for discrimination against the plaintiffs. Plaintiffs participate actively in party/committee affairs and effectively in the political process;

d. There is no evidence that the members of the minority group have been denied access to the endorsement process;

e. The plaintiffs have proved by the preponderance of the evidence that certain members of the minority group in the City bear the effects of discrimination in such areas as education, employment and housing, however, these are not electorial [*sic*] devices created and maintained by the City;

f. There is no evidence that political campaigns for City Council have been characterized by overt or subtle racial appeals;

g. While members of the minority group have been elected to Council, proportional representation would establish a goal that three members of the nine-member council be African Americans. This has not been achieved, however, there is no constitutional or statutory right to proportional representation;

h. It is clear that elected officials have been responsive to the *needs* of the minority group;

i. Finally, there is no consensus supporting any particular election system in the City of Cincinnati. The use of the 9X system in Cincinnati is based on rational reasons which are not tenuous, such as the at-large election of Council produces Councilmembers who are attentive to and responsive to the whole range of interests and issues throughout the City, and the at-large election system eliminates wasted votes and gives voters an opportunity to feel that they, in fact, have elected a representative to Council.

53. Where the size of an electoral district is large enough to increase the cost of campaigning significantly, the use of such a district enhances the opportunity for discrimination, especially against a minority group.

54. Campaigning under the at-large and 9X system is expensive. The need to purchase advertising to reach voters city-wide is the primary cause of this problem. It is unlikely, however, that any alternative election sys-

tem would greatly reduce the level of expenditures needed to mount a successful campaign particularly against wealthy, ambitious opponents.

55. Under the Voting Rights Act, access by African Americans to critical political processes must be "meaningful and reliable." *White v. Regester*, 412 U.S. 755, 767 (1973). These processes—which in Cincinnati include the selection of candidates by the political parties and the Charter Committee for endorsement, political and financial support, and appointment to Council vacancies—are open to African American participation. The ability of African Americans to participate in the political process in Cincinnati is a practical reality—not merely a theoretical possibility. In Cincinnati, for example, a tax levy cannot be enacted without African American support; thus, the City to survive financially must be responsive to the African American community.

56. Party and Charter Committee endorsement and support is a virtual requirement for a successful City Council campaign. Party and Charter Committee leaders grant such endorsement and support primarily on the basis of a prospective candidate's electability. African American candidates are included in the endorsement process and recruited by the Democratic and Republican Parties and the Charter Committee.

57. The process by which appointments to fill vacancies are made to City Council is controlled by party and Charter Committee leaders and the incumbent members of Council. The decision to appoint candidates is based on the same criteria as the decision to grant endorsement and political and financial support.

58. In this City, the majority group vote has not normally defeated the combined strength of African American support for a candidate of their choice plus crossover votes, therefore, here, majority bloc voting does not rise to the level of legal significance. Where

African American candidates have won elections, they have always been opposed. Some have had the benefits of incumbency. All have made important contributions to the community and have represented their views and constituents with vigor and fortitude. Certainly there is no evidence these elections were manipulated by the majority to elect a "safe" minority candidate.

59. Comparing the total number of candidates preferred by African American voters with the number of candidates who have been elected to office makes it clear that African American preferred candidates have usually been elected to City Council. *Gingles* factor III, therefore, has not been satisfied. In the City of Cincinnati, majority bloc voting is not legally significant under either the Constituiton or Section 2 of the Voting Rights Act. Plaintiffs have failed to prove by the preponderance of the evidence that they have less opportunity to participate in the political processes *and* to elect candidates of their choice.

60. It is clear that in the City of Cincinnati each voters' vote carries the same weight in City Council elections.

61. In sum, plaintiffs have failed to prove by the preponderance of the evidence that:

a. the defendants conceived or maintained the at-large system as a purposeful device to further racial discrimination;

b. 9X has a legally significant effect resulting in a dilution of plaintiffs' right to vote and to participate effectively in the political process which governs the City of Cincinnati, Ohio and to elect representatives of their choice;

c. defendants intend the purposeful exclusion of African Americans from participation in the election process;

d. plaintiffs' freedom to vote has been denied or abridged by anyone;

e. there is a legacy of official discrimination in voting matters;

f. defendants hinder African Americans' opportunity to register and to vote;

g. there are persistent appeals to racial prejudice by the City in campaigns in councilmanic elections; or

h. that the purpose of 9X is invidiously to minimize or cancel out the voting potential of plaintiffs.

62. While plaintiffs argue that there should be three African Americans on Council, it is clear that proportional representation is not mandated by the Constitution as an imperative of political organization nor by the Voting Rights Act.

63. It is not a province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the law.

64. The Fourteenth Amendment confers a substantive right to participate in elections on an equal basis with other qualified voters. But this right to equal protection in the electoral process does not protect any political group or candidate, however defined, from electoral defeat.

65. Applying the instructions recently given by the Supreme Court of the United States in *Shaw v. Reno*, —— U.S. ——, 61 U.S.L.W. 4818 (June 28, 1993), this Court concludes it is the individual who is important, not his/her race, his/her creed, or his/her color. The principal of equality is at war with the notion that District A must be represented by an African American, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on. That system, by whatever name it is called,

is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense.

> When racial or religious lines are drawn, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here. *Wright v. Rockefeller,* 376 U.S. 52, 66-67 (1964) (dissenting opinion)

now cited with approval in *Shaw,* 61 U.S.L.W. at 4823-24.

In our multiracial, multireligious, democratic society, the character of an individual, not his/her race or method of worship, must be the criteria of human worth. It is clear that under the Constitution of the United States, we are all members of one and only one race, the human race.

IV. *JUDGMENT*

1. The plaintiffs have failed to establish by the preponderance of the evidence that the 9X electoral system utilized by the City of Cincinnati, Ohio to elect its City Council violates Plaintiffs' rights as secured by the Fourteenth and Fifteenth Amendments to the Constitution of the United States, Section 2 of the Voting Rights Act as amended, Title 42 U.S.C. § 1773 or Title 42 U.S.C. § 1983, therefore, the claims of Plaintiffs are DISMISSED at their costs. The City's Motions for Judgment as a Matter of Law are MOOT AND DENIED.

2. Pursuant to the foregoing, the Motion to Certify a Class Action filed by Plaintiffs (doc. no. 9) is declared MOOT and DENIED WITHOUT PREJUDICE.

3. Pursuant to all of the foregoing, the Motion to Intervene filed by certain citizens of the City of Cincinnati, Ohio (doc. no. 85) requesting permission to be heard and participate in future hearings regarding alternate voting systems and remedies is declared MOOT and DENIED WITHOUT PREJUDICE.

4. This case is TERMINATED on the docket of this Court.

IT IS SO ORDERED.

/s/ Herman J. Weber
HERMAN J. WEBER
Judge
United States District Judge

APPENDIX C

[Filed Dec. 16, 1994]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 93-3864

FRANK CLARKE, *et al.*,
Plaintiffs-Appellants,

v.

CITY OF CINCINNATI, *et al.*,
Defendants-Appellees,

JAMES CISSELL,
Defendant.

ORDER

BEFORE: GUY and BOGGS, Circuit Judges; and CLELAND,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

---

* Hon. Robert H. Cleland, United States District Judge for the Eastern District of Michigan, sitting by designation.

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

The Fifteenth Amendment to the United States Constitution provides, in relevant part:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section .
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which

members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
APR 14 1995
OFFICE OF THE CLERK

No. 94-1536

In The

Supreme Court of the United States

October Term, 1994

FRANK CLARKE, et al.,

Petitioners,

v.

CITY OF CINCINNATI, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTIONS PRESENTED

1. Whether a showing that blacks' preferred black candidates were elected 47 percent of the time rather than 50 percent of the time during a ten year period from 1981 to 1991 mandated a finding of white bloc voting.

2. Whether a court considering an Equal Protection Clause Challenge to a facially neutral law enacted by referendum must ignore legitimate legislative rationales for the measure and attempt to determine the electoral motivation of the voters.

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STATEMENT OF THE CASE

Cincinnati has had a rich political history. A struggle for political dominance has played out since 1924. The Voting Rights Act requires a "searching practical evaluation of the 'past and present reality'."[1] The reality has been the continuing conflict between those promoting reform and those endeavoring to retain or regain hegemony.

By 1924, the Republican Party had dominated Cincinnati politics for the past forty years. At that time, Cincinnati's City Council consisted of 26 ward representatives and six elected at-large; the Republicans held 31 seats, the Democrats had one. The reform movement then came to Cincinnati, led by Murray Seasongood and the Charter Committee. The voters adopted a new Charter and with it the council/manager form of government. The new council had only nine members, elected at-large.[2] The Republicans soon lost control of Council and spent the next three decades trying to regain their earlier hegemony.

The reform also provided for election by a single transferable vote system, commonly known as proportional representation or PR. Under PR a voter cast a ballot by ranking the order of favored candidates, and each

---

[1] 42 U.S.C. §1973. See Senate Report No. 97-417, reprinted in 1982 U.S. Code Cong. & Ad. News 177, 208.

[2] This Court has recognized that " . . . a system of at-large city elections in place of elections of city officials by the voters of small geographic wards was universally heralded not many years ago as a praiseworthy and progressive reform of corrupt municipal government." *Mobile v. Bolden*, 446 U.S. 55, 70 (1980).

ballot was counted only for the candidate ranked highest by that voter whom it could help elect. A ballot cast for a candidate who had more votes than needed for election could be randomly selected for transfer to the candidate ranked next highest on that ballot who had neither been declared elected nor defeated as of that round of vote transfer. The ballots of candidates who received few votes and had been declared defeated were similarly transferred. Because of PR's complexity, as many as ten percent of the ballots were declared invalid. Invalid ballots were not the only ones that went uncounted. If a voter failed to rank enough candidates, that voter's ballot could not be transferred and became ineffective. Ballot counting took days to complete.

The Republican Party had led efforts supporting referenda to replace PR with an alternative at-large electoral system in 1936, 1939, 1947, 1954, and 1957. Three times the vote was within one percent of the 50% approval needed. In the 1955 general election, the last council election before the 1957 referendum, PR had manifested three significant deficiencies – the highest number of invalid and ineffective ballots in its history in Cincinnati had been cast, a recount of the vote greatly delayed reporting of election results, and Republican Party endorsed candidates had won a majority of the first place votes but had only won a minority of seats on Council. The Republicans finally succeeded in the 1957 special referendum election. As almost everywhere else in the United States where PR had ever been used, the voters rejected PR. They replaced PR with a 9X system. In November 1957, the Republican Party's 33-year effort paid off. In the first council election under the 9X system,

the Republicans regained control of Cincinnati City Council.

Under 9X a voter simply places an X by each favored candidate. A voter may cast as many as nine X's. The nine candidates receiving the most X's are elected. Majority support is not required, and a candidate who is given an X on about 35% of the ballots is likely to be elected.

Council elections in Cincinnati are unusual as three political parties endorse candidates. Democrats substantially outnumber Republicans and Charterites. Yet, until 1991, this Democratic majority had never elected a Council majority. The Democrats and the Charterites derive their electoral strength from the same constituency. When they have formed a coalition and cross-endorsed each other's candidates, they have collectively controlled Council. The coalition disbanded in 1985. Each party fared poorly and a previously elected coalition-supported black member of Council lost in the 1985 election.

The Charter Committee, the Democratic Party and the Republican Party have each realized the compelling need to gain the support of the black community and encourage black participation in City politics. Each party has consciously recruited and supported black candidates. Each has involved blacks in the political process.

Blacks usually turn out to vote in Council elections at a rate slightly below the rate of white voters. Dr. Richard Engstrom, petitioners' election expert, testified that black turnout in 1985 was 27.4%, compared with 29.4% for white voters. In 1987 34.9% of black voters turned out, compared with 34.1% of white voters. In 1989 28.4% of black voters turned out, compared with 31.9% of white

voters. Finally, in 1991 32.8% of black voters turned out, compared with 38.1% of white voters.

According to Dr. Richard Engstrom, an at-large election system will dilute black voting strength when blacks are a minority and do not share candidate preferences with the majority. In five of the six Council elections examined in detail by Dr. Engstrom, black voters shared six candidate preferences with the white voters. In the sixth election they had five common preferred candidates.

Voting in Council elections appears to have varied slightly along racial lines. Black and white voters, however, have shared more similarities than differences in the candidates that they support. In six council elections from 1981 to 1991, the preferred candidates of black voters were usually elected to Council, Black voters elected seven of their nine preferred candidates of black voters in 1981. They elected eight in 1983, six in 1985, six in 1987, and six more in 1989. Black voters elected seven of their nine preferred candidates to Council in 1991. In those six elections, black voters elected 74% (40 of 54) of their preferred candidates to Council.

Three elected white members of Council received the second, third, and fourth highest vote total from black voters in the 1987 and 1989 Council elections. They each received more black votes than all but one black candidate.

In the Council elections from 1983 to 1991, preferred candidates of blacks have been elected to Council even though they were not preferred candidates of whites. Preferred candidates of white voters have not consistently won election.

First-time candidates for election are generally not elected to office. In the six council elections from 1981 to 1991, 29 black candidates have run. Of those 29, only four have run for Council more than once. Of those four, three have been elected to Council. Name recognition is critical to election, no matter the system. Even under PR, black candidates were not elected to Council in their first race. No method of election can guarantee or assure the election of first-time candidates running for public office. Name recognition, for black and white candidates alike, directly contributes to success at the polls. Successive candidacies provide the necessary familiarity, and Cincinnati voters reward it.

From 1957 to 1991, 23 Council seats have become vacant. Ten of 23 (43%) appointees to fill those vacancies have been black. Of the 23, 14 have run and succeeded in the subsequent election. Six were black. Conversely, nine of the 23 have failed to be elected in the succeeding election. Of those nine candidates who were not elected in the succeeding election, five were white and four were black. Between 1985 and 1991, five appointments have been made to fill vacancies on Council. Of those five, four appointees were black and one was white. Of the four blacks appointed, only one lost at the next election. The only white appointed to a Council vacancy also lost.

Black candidates have been elected to Council in every election since 1977. In 1991, Dwight Tillery, a black candidate for Council was not only elected to Council but also as Mayor. By Cincinnati's Charter, the council candidate receiving the highest number of votes cast is the

presiding officer of Council and Mayor of the City. Analysis showed that Mayor Tillery received the support of both black and white voters.

The last election, held in November 1993, resulted in the election of three blacks to Council. That election was not among those considered by the District Court. The results have not been subject to statistical analysis, and the preferred candidates of the black and the white voters have not been formally identified. The three black Council members elected, one-third of the Council, do provide representation to black Cincinnatians in strict proportion to their share of the Cincinnati voting age population. According to 1990 Census data, blacks comprised 33.5% of that population.

The City has not had any history of official discrimination that has touched the right of black citizens to register, vote, or otherwise participate in the democratic process. Blacks participate effectively in the political process in Cincinnati. Evidence of participation includes high black voter registration, high black voter turnout, high black participation in community councils, and high black participation at Council committee hearings and Council meetings. A higher percentage of black Cincinnatians register to vote than white Cincinnatians.

Black voters exercise discretion in casting their votes for their preferred candidates. Black voters do not uniformly cast their votes for black candidates. In 1983, black voters' support for black candidates ranged from 27% to 77%. In 1985, black voters' support for black candidates ranged from 13.2% to 70.3%. In 1987, support ranged from 10.5% to 68.4%. In 1989, support ranged from 18.8%

to 71.4%. In 1991, support ranged from 3.4% to 79.2%. In each election examined, black voters dispersed their support to black candidates and white candidates. Black candidates are not consistently the preferred candidates of black voters. Some white candidates received greater support from black voters than almost all black candidates. A number of white candidates have received more than 60% of the black vote.

Cincinnati has no majority vote requirements, anti single-shot provisions, or other voting practices for Council elections that would work against blacks. The appointment of numerous deputy registrars throughout the City has made registration easy.

Black support for white candidates has not been confined to the expressing of their preferences in the ballot box. *The Cincinnati Herald*, a black-owned newspaper distributed in the black community, has endorsed both black and white candidates. In 1987, the black Baptist Ministers Conference endorsed and supported nine candidates. Eight were elected. In 1989, six of the nine Ministers Conference endorsed and supported candidates were elected. In 1991, the results were the same – six of nine of the *Herald*-endorsed candidates were elected.

The policy underlying 9X is well grounded. The at-large election system eliminates wasted votes and gives voters an opportunity to feel that they, in fact, have elected a representative to Council. Almost all voters vote for at least one winning candidate. The at-large election of Council produces members of Council who are attentive to and responsive to the whole range of interests and issues throughout the City. Council has responded to

black concerns. Council placed many City health and recreation facilities in predominantly black communities. It has allocated Community Development Block Grants to minority communities and created the Office of Municipal Investigation, the black Business Incubator, the Capital Venture Program, the housing initiatives of the Department of Neighborhood Housing and Conservation, the Affirmative Action Program and Policies, the Minority Business Enterprise Set-Aside Program, and the Community Reinvestment Ordinance.

Public safety is the overriding issue for black and white Cincinnatians alike. Council has responded to the concerns of black community leaders in the administration of the Safety Department, the City's largest department. Currently, both the Police and Fire Divisions are operating under federal consent decrees. Council voluntarily entered the consent decrees to alleviate the disparate hiring and promotion of blacks in the police and fire divisions. State civil service laws had caused this disparity. Because of the consent decrees and other efforts by Council, police officers and firefighters are coming to reflect the racial composition of the City.

The Safety Department has responded to the needs of the black communities through increased patrols in high crime areas, a direct result of the black community demanding a stronger police presence. Recognizing past strained relationships between the Police Division and the black community, the Department now gives all police officers diversity training. The diversity training focuses on the black community. The Sentinels, an organization of Black Cincinnati police officers, has been instrumental since its inception in conveying to Council and the City Administration the needs and desires of the black

police officers and the black community. Council has listened attentively.

The Senate Report is the authoritative expression of Congress' intent in amending Section 2 of the Voting Rights Act. In the report, the Senate Judiciary Committee specifically discusses Cincinnati:

> Cincinnati was the subject of one of the most detailed investigations of the entire study [Department of Justice Study conducted in 1978]. The report of the study is squarely stated:
>
> > In Ike (sic) manner, Cincinnati, Ohio, was the subject of a vote dilution investigation by the Civil Rights Division but once again, the Division did not discover the facts necessary to institute a lawsuit under the *White v. Regester* standard.
>
> The 1978 Justice Department investigation also encompassed over half of the cities mentioned in the Subcommittee Report, and two of the cities cited by the Subcommittee were the subject of the more detailed Justice investigations. Cincinnati and Waterbury, Connecticut, where, again, no potential dilution case under the results standard was found.
>
> * * *
>
> The Committee has been well aware of the great importance of this issue and accordingly has examined it at great length. However, it concludes as did the House Judiciary Committee, that the amendment to Section 2 is careful, sound, and necessary, and will not result in wholesale invalidation of electoral structures.
>
> Sen. Rpt. p. 213

SUMMARY OF ARGUMENT

The present case is grounded in its particular facts which show that white voters do not vote as a bloc to enable it usually to defeat the minority's preferred candidates. Under *Thornburgh v. Gingles*, 478 U.S. 30 (1986) those challenging an at-large system under §2 must prove three *necessary preconditions* before an at-large system will be found to impair minority voters' ability to participate in the political process and to elect representatives of choice. These necessary preconditions are: (1) "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district; (2) "the minority group must be able to show that it is politically cohesive"; and (3) "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed,. . . . usually to defeat the minority's preferred candidate." *Id.*, at 50-51.

While the extent to which members of a protected class have been elected to office in a political subdivision is a fact that can be considered as part of the totality of circumstances, that factor is not determinative of the *Gingles* necessary preconditions. Section 2 claims are analyzed under a two-part framework. *Magnolia Bar Ass'n, Inc. v. Lee*, 994 F.2d 1143, 1146 (5th Cir. 1993). First, the electoral system or structure is subjected to the threshold requirements of *Gingles*. Then the circumstances of the local political landscape are scrutinized, including the various factors listed in the Senate Report appropriate to the totality of the circumstances, one of

which is the extent to which minority members have been elected to public office. *Id.* This single factor among the totality of circumstances does not define or determine the preferred candidates of minority voters. Instead, the identification of preferred candidates of minority voters can only be determined in the election results themselves.

The relevance of the race of a candidate is not to identify the preferred candidate of the minority voters. The race of the candidate is a talisman for identifying relevant elections for the dilution analysis. As petitioners concede, a black candidate is not tantamount to a black preference. However, a court may use the race of a candidate to identify relevant elections for the dilution analysis. Minority preferences would be better determined from elections which offer the choice of a minority candidate. *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 504 (5th Cir.), *cert. denied*, 492 U.S. 905 (1989) ("black preference is determined from elections which offer the choice of a black candidate."); accord *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989).

The Trial Court and the Court of Appeals did consider the race of the candidate in reviewing all surrounding facts and circumstances. Both Courts concluded that a 47 percent success rate for blacks preferred black candidates during the period 1981 to 1991 did not constitute a showing that white voters voted as a bloc to enable them ordinarily to defeat the minority's preferred candidate.

As the Court of Appeals noted from the record, 8 of 17 of blacks' preferred black candidates were elected during the relevant time period. Neither the District Court nor the Court of Appeals erred in concluding the contrary based on the facts adduced at trial.

Nor did the Court of Appeals err in refusing to recognize incumbency as a special circumstance. Obviously, as the Court noted, incumbency plays a significant role in the vast majority of American elections. To consider incumbency a "special circumstance" would call into question all of those elections. One might well consider name recognition or popularity to also constitute special circumstances.

Petitioners also argue that the whiteness of the party leadership, of itself proves limited access. Petitioners cite no fact in support of this contention. The Court of Appeals did not err in upholding the Trial Court's finding to the contrary.

The lower (47 percent as opposed to 74 percent) success rate of blacks preferred black candidates does not prove the existence of legally significant white bloc voting. Since 47 percent of blacks' preferred black candidates were elected during the time period 1981 to 1991, the Court of Appeals concluded that petitioners had not met their burden of proving that white bloc voting has been targeted against blacks' preferred candidates. No minimum

number of black candidates need be successful in order for the 9X system to pass muster under §2.

The Court of Appeals conducted a searching practical evaluation of past and present reality upon which resolution of the central question of equality of electoral opportunity should be based. As the Court of Appeals noted, its review of the factual findings of the Trial Court were for clear error only. The Court's *de novo* review extended only to interpretations of the law. *Gingles*, 478 U.S. at 79. Whether an electoral system has diluted the voting power of a minority group is a factual question. *Id.* The Court of Appeals did not hold that the District Court's interpretation of the law was incorrect. Rather, the Court held that the District Court's factual finding that petitioners had failed to prove the existence of white bloc voting was not clearly erroneous.

The voters of the City of Cincinnati were not motivated by racial prejudice in replacing the PR with 9X. Given the protection accorded the secret ballot, a court cannot accurately determine voter motivation. A court cannot possibly divine the motive of voters in a referendum process that occurred in 1957, nearly 40 years ago. Adding to the difficulty are the large number of legitimate legislative motives for replacing the unwieldy and near incomprehensible PR with the much more straightforward 9X. The present case illustrates the immense difficulty in determining the legislative motives of the electorate, and does little to show how the attempt would achieve an important policy objective. The fact that referenda may be growing in popularity provides no basis for concluding otherwise.

Collins v. City of Norfolk, Va., 883 F.2d 1232 (4th Cir. 1989) was decided on facts which were very different

from those of the present case. The Court in *Collins* was careful to note that it did not consider that only a black candidate could be considered a black preferred candidate:

> "In the context of polarized voting, the Supreme Court differs over whether the race of the candidate is significant. . . . We need not pursue this issue to decide this case." *Id.*, at 1237 n. 7.

The opinion of the Court of Appeals in the instant case is consistent with *Collins*, the difference in outcomes was due to factual differences.

Nor does the opinion of the Court of Appeals conflict with *Kirksey v. City of Jackson*, 669 F.2d 316, 317 (5th Cir. 1982). In that case the Fifth Circuit held that "an individual voter may not be subjected to judicial examination concerning how he voted or why he personally voted in fashion. Admittedly, in a proper case a court may be examined by the introduction of evidence, direct or circumstantial. Of course, where racial discrimination is the only apparent reason for referendum results a court may examine voter motivation. However, the present case does not indicate that type of abuse of the electoral process.

REASONS WHY THE PETITION SHOULD BE DENIED

1. This case is firmly grounded in its particular facts which show that white voters do not vote as a bloc to enable it usually to defeat the minority's preferred candidate.

Section 2 of the Voting Rights Act ("§2"), 42 U.S.C. §1973, as amended in 1982, prohibits any "standard,

practice or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." A violation of §2 is established if, "based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the . . . political subdivision are not equally open to participation by [minority voters] in that . . . [they] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

Discriminatory purpose is not required in order to establish a violation of §2. S.Rep. No. 97-417, reprinted in 1982 U.S. Code Cong. & Ad. News 177, 205 (hereinafter cited as S.Rep.). Under the "results test", minority voters must prove that as a result of the challenged practice or structure these voters do not have an equal opportunity to participate in the political processes and to elect candidates of their choice. *White v. Regester,* 412 U.S. at 766, quoting *Whitcomb v. Chavis,* 403 U.S. 124, 146-150 (1971). Whether the political processes are equally open "depends upon a searching practical evaluation of the 'past and present reality'." S.Rep. at 208.

Section 2 claims brought against multi-member districts and at-large elections are governed by the framework established in *Thornburg v. Gingles,* 478 U.S. 30 (1986). Under *Gingles,* plaintiffs challenging an at-large system under §2 must prove three *necessary preconditions* before an at-large system will be found to impair minority voters' ability to participate in the political process and to elect representatives of choice. These necessary preconditions are: (1) "the minority group must be able to demonstrate that it is sufficiently large and geographically

compact to constitute a majority in a single member district; (2) "the minority group must be able to show that it is politically cohesive"; and (3) "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed, . . . usually to defeat the minority's preferred candidate." *Id.* at 50-51. Satisfaction of these three preconditions is a prerequisite to but not sufficient to establish liability under §2. *Voinovich v. Quilter,* ___ U.S. ___, 113 S.Ct. 1149 (1993); *Chisom v. Roemer,* ___ U.S. ___, 111 S.Ct. 2354 (1991).

Experts for both sides, Dr. Richard Engstrom, and Dr. Alfred Tuchfarber, defined the preferred candidates of black voters to be the nine candidates receiving the highest vote in the field of candidates. Neither side contested, challenged or disputed this definition of a preferred candidate of minority voters. Consequently, the District Court looked to the top nine candidates among black and white voters in its analysis of whether white majority voted sufficiently as a bloc to enable it to usually defeat blacks' preferred candidates.

Petitioners urge including only black candidates preferred by blacks among the top nine in the field of candidates. Such a restriction contradicts the evidence and expert opinions presented at trial, but more importantly, violates the plain meaning and purpose of §2.

While the extent to which members of a protected class have been elected to office in a political subdivision is a fact that can be considered as part of the totality of circumstances, that factor is not determinative of the

Gingles necessary preconditions. Section 2 claims are analyzed under a two-part framework. *Magnolia Bar Ass'n, Inc. v. Lee*, 994 F.2d 1143, 1146 (5th Cir. 1993). First, the electoral system or structure is subjected to the threshold requirements of *Gingles*. Then the circumstances of the local political landscape are scrutinized, including the various factors listed in the Senate Report appropriate to the totality of the circumstances, one of which is the extent to which minority members have been elected to public office. *Id.* This single factor among the totality of circumstances does not define or determine the preferred candidates of minority voters. Instead, the identification of preferred candidates of minority voters can only be determined in the election results themselves. The statute does not predetermine the inquiry.

Section 2 provides unequivocally:

> *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.[3]

Senator Dole, the sponsor of this language amending §2, stated that "a unanimous consensus was established,

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[3] Section 2 tracks the "results test" in *Whitcomb v. Chavis* and *White v. Regester*. In *Whitcomb*, the Court observed: " . . . the fact that the number of ghetto residents who were legislators was not in proportion to ghetto population [did not] satisfactorily prove invidious discrimination. . . . " *Id.* at 149. "[T]he central theme of *Whitcomb* and *White* is 'that it is not mere suffering at the polls but discrimination in the polity with which the Constitution is concerned.' " *Shaw v. Reno*, ___ U.S. ___, 113 S.Ct. 2816, 2835 (1993) (*White*, J. dissenting); *League of United Latin Amer. Citizens v. Clements*, 999 F.2d 831, 853 (5th Cir. 1993) (en banc).

among both the opponents and proponents of the results test, that the test for §2 claims should not be whether members of a protected class have achieved proportional representation. It was generally agreed that the concept of certain identifiable groups having a right to be elected in proportion to their voting potential was repugnant to the democratic principles upon which our society is based. Citizens of all races are entitled to have an equal chance of electing candidates of their choice, but if they are fairly afforded that opportunity, and lose, the law should offer no redress." S.Rep. at 364, Senator Dole stated unequivocally that "the focus of the [results] standard is on whether there is equal access to the political process, not on whether members of a particular minority group have achieved proportional election results." *Id.*

Section 2 does not guarantee election results, instead, "§2 protects the right of minority voters to be free from election practices, procedures or methods that deny them the same opportunity to participate in the political process as other citizens enjoy." S. Rep. at 206. Consequently, §2 does not guarantee the election of any particular number of black candidates to City Council; instead, §2 protects the right of black voters to participate in the political process and to elect candidates of *their choice*, regardless of the candidates' skin color.

Certain courts have considered the race of the candidate to be relevant. However, the relevance is not to identify the preferred candidate of the minority voters. The race of the candidate is a talisman for identifying relevant elections for the dilution analysis. As petitioners concede, as in the case of Mr. Blackwell, a black candidate is not tantamount to a black preference. However, a court

may use the race of a candidate to identify relevant elections for the dilution analysis. Minority preferences would be better determined from elections which offer the choice of a minority candidate. *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 504 (5th Cir.), *cert. denied*, 492 U.S. 905 (1989) ("black preference is determined from elections which offer the choice of a black candidate."); accord *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989).[4]

Furthermore as this Court has noted in *Shaw v. Reno*:

> Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. *Racial classifications with respect to voting carry particular dangers.* Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions: it threatens to carry us further from the goal of a political system in which race no longer matters – a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. *Shaw*, 113 S.Ct., at 2832 (Emphasis Added.)

A searching practical analysis of the councilmanic elections using the agreed definition of preferred candidates of black voters, divorced of any racial priorities, demonstrates that the preferred candidates of black voters in City Council elections have not usually been

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[4] In every election before the District Court herein the voters were presented with a variety of candidates, including blacks and women. Thus, all were relevant.

defeated. In the six councilmanic elections from 1981 to 1991, forty (40) of fifty-four (54) (74%) of the preferred candidates of black voters have been elected to Council.

Black voters exercise discretion in casting their votes for preferred candidates. Black voters do not uniformly cast their votes for black candidates. David Mann, Charles Luken and Bobbie Sterne, elected members of Council, received the second, third and fourth highest vote total from black voters in the 1987 and 1989 Council elections. They each received a greater percentage of the estimated black votes than all but one black candidate. Clearly, black voters do not prefer exclusively black candidates. In fact, black support for black candidates ranged from 13.2% to 70.3% of the estimated black vote in 1985; from 10.5% to 68.4% of the estimated black vote in 1987; from 18.8% to 71.4% of the estimated black vote in 1989 and from 3.4% to 79.2% of the estimated black vote in 1991. Such evidence demonstrates unequivocally that black voters in Cincinnati do not uniformly and without exception cast their ballots for black candidates.[5] In 1991 alone, only three black candidates were among the preferred candidates of black voters from a field of nine black candidates.

The District Court and the Court of Appeals did consider the race of the candidate in reviewing all surrounding facts and circumstances. However, both Courts concluded that a 47 percent success rate for blacks preferred black candidates during the period 1981 to 1991

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[5] Further evidence of the diversity of electoral support from black voters is endorsements. Both influential black organizations and influential black leaders have endorsed white candidates.

did not constitute a showing that white voters voted as a bloc to enable them ordinarily to defeat the minority's preferred candidate.[6] As the Court of Appeals noted 8 of 17 of blacks' preferred black candidates were elected during the relevant time period. Petitioners' sole argument, with regard to the existence of white bloc voting, is that since 8 and not 9 of blacks preferred black candidates were elected to council during a time period covering 6 elections, the existence of white bloc voting has been established. Neither the District Court nor the Court of Appeals erred in concluding the contrary based on the facts adduced at trial.

Nor did the Court of Appeals err in refusing to recognize incumbency as a special circumstance. Obviously, as the Court noted, incumbency plays a significant role in the vast majority of American elections. To consider incumbency a "special circumstance" would call into question all of those elections. One might well consider name recognition or popularity to also constitute special circumstances. As petitioners note, "celebrity status" is "equally" important.

Petitioners also argue that the whiteness of the party leadership, of itself proves limited access.[7] Petitioners cite

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[6] Inclusion of black candidates not preferred by blacks makes little sense in connection with an analysis of white bloc voting. If the candidate is not favored by the minority, the candidate's lack of success cannot be attributed to white bloc voting. Rather, even if whites do not vote as a bloc, that candidate will not be successful.

[7] As noted above, the trial Court made a specific finding of fact that the appointment political process leading to election of council was open to both whites and blacks equally.

no fact in support of this contention. The Court of Appeals did not err in upholding the District Court's finding to the contrary.

2. The Court of Appeals applied well settled legal principles in upholding the District Court's finding that petitioners had failed to prove the existence of white bloc voting.

The District Court noted that blacks' preferred candidates achieved a 74 percent success rate during the 1981 to 1991 time period.[8] The Court also noted, in its extensive findings of fact, the racial composition of Cincinnati City Council from the time period 1957 to 1991. The Court further noted that African Americans had been elected to Council. It also noted that the political process leading to election of Council, including nominating committees, candidate recruitment, candidate election and support for candidates is equally open to African Americans. The Court found that under the totality of the circumstances the 9X system of electing council does not impair or impede the ability of African Americans to have an equal opportunity to participate in the political process and to elect candidates of their choice. Furthermore, the Court noted that while members of the minority group have been elected to Council, proportional representation would establish a goal that three members of Council would be African American. While this had not been achieved, there was no statutory or constitutional guarantee of proportional representation.

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[8] In 1993, 3 black preferred black candidates were elected to city council.

The Court of Appeals attempted to determine whether the lower (47 percent as opposed to 74 percent) success rate of blacks preferred black candidates proved the existence of legally significant white bloc voting to such a degree that the District Court's finding to the contrary rose to the level of clear error. In making this determination the Court of Appeals first noted that the existence of racially identifiable voting patterns itself is not sufficient to demonstrate the existence of white bloc voting; rather, to find that white block voting is targeted against a group of candidates, a white majority must usually be able to defeat them. Since 47 percent of blacks' preferred black candidates were elected during the time period 1981 to 1991, the Court of Appeals concluded that petitioners had not met their burden of proving that white bloc voting has been targeted against blacks' preferred candidates. The Court correctly stopped short of requiring a minimum number of black candidates be successful in order for the 9X system to pass muster under §2.

Petitioners complain that the approach taken by the Court of Appeals denies petitioners a searching practical evaluation of past and present reality upon which resolution of the central question of equality of electoral opportunity should be based. This claim is contradicted by the facts and a review of the appellate decision. As the Court of Appeals noted, its review of the factual findings of the District Court were for clear error only. The Court's *de novo* review extended only to interpretations of the law. *Gingles*, 478 U.S. at 79. Whether an electoral system has diluted the voting power of a minority group is a factual question. *Id.* Therefore, contrary to petitioners' assertion, the Court of Appeals did not hold that the District

Court's interpretation of the law was incorrect. Rather, the Court merely held that the District Court's factual finding that petitioners had failed to prove the existence of white block voting was not clearly erroneous.

3. This Court should not change the clearly established law that a court should not inquire into the motivation of voters in an equal protection clause challenge to a referendum election involving a facially neutral law unless racial discrimination was the only possible motivation behind the referendum results.

Petitioners claim that the District Court should have ignored legitimate legislative rationales and instead attempted to discern the actual motives of the electorate in the defeat of PR and the passage of 9X. Petitioners claim that 9X was passed by voters on the basis of racial animus.

As the Sixth Circuit noted in *Arthur v. City of Toledo*, 782 F.2d 565 (6th Cir. 1986):

> "Several important policy considerations limit a court's examination of the factors motivating the electorate in a referendum election. Initially, this country has traditionally protected the secret ballot. . . . Since a court cannot ask voters how they voted or why they voted that way, a court has no way of ascertaining what motivated the electorate." *Id.*, at 573.

To assume, as petitioners urge, that the voters of the City of Cincinnati were motivated only by racial prejudice simply has had no basis in any objective fact. Given the protection of the secret ballot it is difficult to imagine

how a court could accurately determine voter motivation. In any event, the present case provides no a compelling reason for attempting to do so. The odds of a court divining the motives of voters in a referendum process that occurred in 1957, nearly 40 years ago, are infinitesimal at best. Adding to the difficulty are the large number of legitimate legislative motives for replacing the unwieldy and nearly incomprehensible PR system with the much more straightforward 9X. Therefore, the present case illustrates the immense difficulty in determining the legislative motives of the electorate, and does little to show how the attempt would achieve an important policy objective. The fact that referenda may be growing in popularity provides no basis for concluding otherwise.

4. This case does not create a direct conflict among the decisions of the Courts of Appeals with respect to the existence of white bloc voting or scrutiny of electoral motives in a proper case.

Petitioners claim that *Collins v. City of Norfolk, Va.*, 883 F.2d 1232 (4th Cir. 1989) is in conflict with the Court of Appeals decision herein. However, an examination of *Collins* belies petitioners' argument. In *Collins*, the Fourth Circuit examined a District Court determination that white bloc voting did not exist in the city of Norfolk. In examining this determination, the Court noted that black voters in Norfolk were effectively disenfranchised by the Virginia Constitution in 1902. Among the devices used to limit black participation in elections were the literacy test, which remained in effect until the enactment of the Voting Rights Act of 1965, and the poll tax declared unconstitutional in *Harper v. Virginia Board of Elections*,

383 U.S. 663 (1966). Further, the Court noted that from 1918 until 1968, every member of Norfolk's city council was white. In 1968 a black citizen was elected to council, and from that date until the filing of the action city council had only one black member. *Id.*, at 1235.

Given this factual background, the Fourth Circuit determined that the District Court's finding of no white bloc voting was clearly erroneous. *Id.*, at 1243. However, the Court in *Collins* was careful to note that it did not hold that only a black candidate could be considered a black preferred candidate:

> "In the context of polarized voting, the Supreme Court differs over whether the race of the candidate is significant. . . . We need not pursue this issue to decide this case." *Id.*, at 1237 n. 7.

Therefore, the opinion of the Sixth Circuit Court of Appeals in the instant case is consistent with *Collins* despite the fact that in *Collins*, based on the particular record of that case, the Fourth Circuit decided that the trial court was clearly erroneous.

Nor does the opinion of the Court of Appeals conflict with *Kirksey v. City of Jackson*, 669 F.2d 316 (5th Cir. 1982). In that case the Fifth Circuit held that "an individual voter may not be subjected to judicial examination concerning how he voted or why he personally voted in that fashion." Admittedly, in a proper case a court may be examined by the introduction of evidence, direct or circumstantial. Examples of what constitute the "proper"

case are in fact listed by the Fifth Circuit.[9] *Id.*, at 316, 317. In all of the cases listed, racial discrimination was the only possible motivation behind the referendum results. In the words of the *Kirksey* Court, " . . . the record in the case before us does not establish that type of abuse of the electoral process."

CONCLUSION

For all of the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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[9] *Hunter v. Erickson*, 393 U.S. 385 (1969); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Lucas v. Colorado General Assembly*, 377 U.S. 713 (1964).